

1                   IN THE UNITED STATES DISTRICT COURT  
 2                   FOR THE DISTRICT OF NEW JERSEY  
 3                   Civil No. 2:08-cv-05169(WJM)-MF

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 5           IN RE URETHANE ANTITRUST       :       TRANSCRIPT OF PROCEEDINGS  
 6           LITIGATION                       :       - Trial -  
 7           - - - - - - - - - - - - - - -X

8   Newark, New Jersey  
 9   April 1, 2016

10           B E F O R E:

11   THE HONORABLE WILLIAM J. MARTINI,  
 12   UNITED STATES DISTRICT JUDGE,  
 13   And a Jury

14           Pursuant to Section 753 Title 28 United States Code, the  
 15           following transcript is certified to be an accurate record as  
 16           taken stenographically in the above entitled proceedings.

17           S/WALTER J. PERELLI

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 19           WALTER J. PERELLI, CCR, CRR  
 20           Official Court Reporter

1       A P P E A R A N C E S:

2           BLANK ROME LLP  
3           BY:   JEFFREY M. JOHNSON, ESQ.  
4                ALEX E. HASSIC, ESQ.  
5                DANIEL SCHAEFER, ESQ,  
6                MEGAN WOOD, ESQ.  
7           Attorneys for Plaintiffs

8           GIBBONS P.C.  
9           BY:   LAWRENCE S. LUSTBERG, ESQ.  
10               DANIEL J. McGRADY, ESQ.  
11               - and -  
12           DECHERT LLP  
13           BY:   DAVID M. BERNICK, ESQ.  
14                JULIA CHAPMAN, ESQ.  
15                WILLIAM T. McENROE, ESQ.  
16                JONATHAN STREETER, ESQ.  
17                KENNETH J. HOLLOWAY, ESQ.  
18           Attorneys for Defendant

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## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
RICHARD L. BEITEL				
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1 April 1, 2016

2 (Trial resumes - Jury not present.)

3 THE COURT: Good morning, everyone.

4 MR. STREETER: Good morning.

5 MR. JOHNSON: Good morning.

6 THE COURT: Are we all set?

7 Okay. You have a live witness this morning?

8 MR. STREETER: We do, yes.

9 THE COURT: Okay.

10 THE DEPUTY CLERK: Please rise for the Jury.

11 (Jury present.)

12 THE COURT: Good morning. You can be seated. Thanks.

13 Welcome back.

14 Okay. Mr. Streeter, it's your turn I guess?

15 MR. STREETER: Yes, your Honor.

16 Dow calls Richard Beitel.

17 THE DEPUTY CLERK: Over here by me, sir.

18

19 R I C H A R D L. B E I T E L, called as a witness, having  
20 been first duly sworn, is examined and testifies as  
21 follows:

22

23 THE DEPUTY CLERK: Please state and spell your name  
24 for the record.

25 THE WITNESS: Richard Beitel, B-e-i-t-e-l.

1 THE DEPUTY CLERK: Thank you, you may be seated.

2 THE COURT: Good morning.

3 THE WITNESS: Good morning.

4 THE COURT: Mr. Beitel, keep your voice up and speak  
5 directly into the microphone, you can move it.

6 THE WITNESS: Can you hear me?

7 THE COURT: I think if you tip it down just a touch.  
8 Okay.

9 THE WITNESS: Okay.

10 THE COURT: That's better. Thanks.

11 MR. STREETER: Good morning.

12 DIRECT EXAMINATION

13 BY MR. STREETER:

14 Q Good morning, Mr. Beitel.

15 A Good morning.

16 Q Mr. Beitel, can you start out by telling the jury where you  
17 grew up?

18 A I grew up in a little town called Red Lodge, Montana up in  
19 Montana, and it's a small town around 3,000 people. It's sort  
20 of the entrance to Yellowstone Park.

21 THE DEPUTY CLERK: Can you hear him?

22 THE COURT: Mr. Beitel, pull your chair up a little.

23 (Discussion off the record regarding the witness  
24 speaking into the microphone.)

25 THE WITNESS: I'm sorry. I'm not used to this.

1 THE COURT: That's all right.

2 THE REPORTER: We have to repeat the answer.

3 A The small town I grew up in was Red Lodge Montana which is  
4 outside of Billings. It's one of the entrances to Yellowstone  
5 Park. Population, about 3,000 people.

6 Q And where did you go to college?

7 A I went to college in Bozeman, Montana State University.

8 Q What did you study?

9 A I studied and became a chemical engineer, graduating from  
10 MSU Bozeman.

11 Q What year did you graduate?

12 A I graduated in December 1969.

13 Q And where did you go to work after college?

14 A After college I went to work for Dow Chemical. Interviewed  
15 several companies, Dow hired me in Midland, Michigan but they  
16 moved me to Los Angeles, California to start.

17 Q And between when you started at Dow and 2004, did you work  
18 at Dow that entire time?

19 A No. In September of 2000 -- I mean September of 1970 --  
20 I'm sorry -- I took a leave of absence from Dow and went into  
21 the Marines. They delayed me going into the Marines because I  
22 had to get married and I had already set up the wedding date,  
23 so the Marines allowed me to wait until after I got married to  
24 go into the Marines. And I spent six months in the Marines  
25 down in San Diego, Camp Pendleton area.

1 Q After you finished with the Marines you went back to work  
2 for Dow?

3 A Went back to work for Dow, again back in Los Angeles.

4 Q And worked there all the way through 2004?

5 A Worked for Dow through 2004, but I moved from California  
6 back to Midland, Michigan, and I moved back to Midland,  
7 Michigan in 1977.

8 Q And focusing on the time period that's relevant for this  
9 case and that focuses on the allegations in this case, 1994 to  
10 2003, what jobs did you have at Dow during that time period?

11 A There was a little bit of a transition job there. I was  
12 sort of Director of Sales for Thermosets for North America;  
13 then that involved me becoming Director of Thermosets for  
14 Polyurethanes for North America; then eventually in 2000 I  
15 became Commercial Director for Polyurethanes for North America.

16 Q And when you were commercial director, what was sort of  
17 under your responsibility?

18 A Commercial director had both marketing responsibility and  
19 the sales responsibility for the North America area.

20 Q And when did you -- who did you report to in the period  
21 from 1994 through 2003?

22 A There were several people I reported to. One of the major  
23 ones was Bob Wood. But 1994, there were several different  
24 players that came through. And the chain of command was a  
25 little bit different because there was a chain of my direct

1 reports of several different people than David Fischer that  
2 appeared into it.

3 Q Was there ever a time when you reported to Bill Long?

4 A Yes, I reported to Bill Long. That started probably in  
5 1992, and that carried over until actually Bob Wood became the  
6 major guy. I think that was 1996.

7 Q And then Bob Wood all the way through 2003?

8 A All the way through 2003.

9 Q And after leaving Dow, what did you do next?

10 A After leaving Dow, I worked in the industry for so long, I  
11 did some consulting work for the OmniTech or the United Soybean  
12 Oil helping to promote the use of soybean oils into urethane  
13 applications, but that was basically as a consulting job doing  
14 some conventions and so forth for them.

15 I had moved from Midland, Michigan to Montana, but  
16 then I was hired again to go to work for Bob Wood with ChemTura  
17 in Connecticut.

18 Q And how long did you work at ChemTura?

19 A Actually it was -- I went there and started April, then I  
20 quit after really 26 months, in June of 2008.

21 Q And what did you do starting in June of 2008?

22 A I moved back to Montana full-time from Connecticut, and I  
23 had fun playing golf and traveling a little bit and plans that  
24 my wife set up for me to do actually, and then went and got  
25 appointed to the Yellowstone Stone County Tax Appeal Board.



1 There's a group that people appeal their property taxes and  
2 industries appeal their property taxes, so with my background I  
3 was appointed do the Yellowstone County Tax Appeal Board which  
4 I belonged to for seven years now.

5 Q I want to focus in on price increase announcements which  
6 the jury has heard a lot about, and I want you to tell the jury  
7 what -- describe for us how the process worked of putting out  
8 price increase announcements during that 1994 to 2003 time  
9 period.

10 A During that time period of course I was sort of in charge  
11 of the sales for North America, but I would be the guy that  
12 really put the name on the letter for the announcements going  
13 out. But if we were looking at putting together any type of  
14 price increase, it was a team effort that you looked at putting  
15 together. You had the business managers in there along with  
16 like a Bob Wood or Marco Levi, Stephanie Barbour. So you'd  
17 have the business managers along with the director of  
18 marketing, director of sales.

19 So it was a team effort. And actually we had Legal  
20 people there and Communication people because you had a team  
21 putting together exactly when and what pricing structure you  
22 wanted put out.

23 Q And you mentioned you signed the letters?

24 A I signed the letters since I had been involved in the  
25 urethane business since back in 1986 in that part of the

1 business for North America. So there was a lot of name  
2 recognition, but I was also the Director of Sales at the time,  
3 so the letter went out from the Director of Sales to the  
4 customer base that I knew through my salespeople and so forth.  
5 Q And I want to talk a little bit about the team that worked  
6 on this.

7 First of all, let's focus in on the earlier period of  
8 time, the 1994 and 1997 time. Do you remember would the team  
9 members were that worked on price increase announcements then?

10 A Well, it was a little bit different. I think we had  
11 several key guys in there. But like I said, Bill Long and Bob  
12 Wood were the top of the list. And then you had people working  
13 under you like David Fischer and so forth. There was also like  
14 Marco Levi, Stephanie Barbour who were in the business group  
15 involved. So there was a team effort. It just wasn't --  
16 Charles Churet from Europe had some impact because he was sort  
17 of managing the European operation at that time, and there was  
18 overlap and he did some work in the U.S. for a short period of  
19 time there.

20 Q And were there people involved in the process who were  
21 called business managers?

22 A That was like Marco Levi and Stephanie Barbour, they were  
23 sort of like the business managers for their particular lines  
24 of products in the polyurethane area, yes.

25 Q And do you remember a person named Patrick Ho?

1 A Yes.

2 Q And in the '94 to '97 time frame, what job did he have?

3 A He could have been in one of those jobs involved in part of  
4 the polyurethane business for North America at that particular  
5 time, yes.

6 Q A business manager?

7 A A business manager type, yes.

8 Q So before Stephanie and Marco come in, Patrick was there?

9 A Patrick would be there. Stephanie and Marco came in a  
10 little later, yes.

11 Q Understood.

12 And you said there was some team process. What went  
13 into that process? What did the, for instance, what did the --  
14 what did the business people contribute to the process? What  
15 was their input into the process?

16 A Well, the business people were the ones that were actually  
17 dealing more with the manufacturing location so they knew  
18 exactly what the plants were doing, the volume of the plants  
19 were doing. So they were actually the ones looking at the  
20 business from the standpoint of the profit and loss for those  
21 particular businesses. So they had that responsibility from  
22 the standpoint of -- of the business character for their  
23 systems or their part of the business of the polyurethane area.

24 Q And what about the boss; first Bill Long and then Bob Wood,  
25 what input did they have?

1 A They had the overall responsibility. They also had things  
2 like research reporting to them, other factors, not only the  
3 business but that they had all subgroups. And at a time Bill  
4 Long had other businesses that he was focused into, not only  
5 the polyurethanes but he had some other businesses.

6 Q And how about your input, what was your input into the  
7 process?

8 A My input into the process was I was giving information I  
9 was getting from the customer base and so forth being in the  
10 selling role, my people that were out there calling on  
11 customers would be dealing individually with the customers,  
12 they'd be giving me feedback what was going on with the  
13 customer base. I'd be looking at how the market was, what  
14 customers we were able to increase and have a good working  
15 relationship. So we were really taking the product and selling  
16 it to those major customers that we worked in a strong building  
17 relationship with.

18 Q And you described this whole team. Would you have a  
19 meeting?

20 A Basically we were all in Midland, Michigan. I was in  
21 Midland, Michigan along with market group managers, Bob Wood  
22 and everybody else, so we were all in Midland. So we'd have a  
23 team meeting to get together to decide exactly what we were  
24 going to do as far as pricing. Also we got involved in plant  
25 expansions a little bit along those lines too, what the economy

1 would do. So we'd get together as a meeting, and for that  
2 meeting we'd decide and then implement the strategy which we  
3 were going to do.

4 Q Okay. That's step one, the sort of meeting of the team.

5 A Right.

6 Q What's the next step in the process?

7 A Well, the meeting of the team, we'd meet as a team and  
8 decide the activities, what we were going to do. Price  
9 increases, the team would meet; here what's our costs are for  
10 these products; here's what we need to do in order to cover our  
11 cost; here's the cost of -- raw material costs are going up and  
12 so forth.

13 So you'd get feedback from the team. We'd also get  
14 feedback, we were looking at plant expansions, we also would  
15 get feedback that we're looking at new product introductions.  
16 In the polyol area there's are a lot of different products  
17 going into different markets: The flexible slab market, the  
18 flexible mold market, there's the CASE market, sealants and so  
19 forth.

20 So at the time the research group and manufacture  
21 would go come out with new products that would be made in the  
22 plants. So we got together and discussed, here's what we have,  
23 we have a new product. Where's the market? What was the  
24 effort to go there? And that would be fed from the business  
25 team over to the sales team to look at where is our customer

1 base and what we should do.

2 Q And after all that was decided and the group had decided  
3 this is what we're going to go out with the price increase  
4 announcement, what's the next step? Is there a point where  
5 Legal gets involved? Is there a point where Communications  
6 gets involved?

7 A Yeah. The team where you have put together what you're  
8 going to do as far as pricing, right, Legal becomes involved in  
9 the decision and also Communications get involved

10 Q What role do each of them have in the next step?

11 A Well, Legal has to check off in everything we're doing as  
12 far as the game plan. We have a lot of customers, the  
13 contracts, so Legal looks at the implications of how we're  
14 increasing it, the timing of the increases and so forth. And  
15 also Communications put together typically the communications  
16 goes out to the field sales organizations and also into the  
17 customer base.

18 Q And eventually a letter would come out?

19 A Eventually a letter would come out. But the letter  
20 obviously didn't go to all the customer base, because like I  
21 said, different polyols went into different applications. You  
22 have the flexible slab market, the flexible mold market, the  
23 CASE market. But there would be a price increase letter that  
24 is generated that went out to the customers, yes.

25 Q And you signed those?

1 A I signed them, yes.

2 Q And what kind of things would they say in them? You know,  
3 what would they say about why you were raising prices?

4 A Well, a lot of times it could be the raw material costs  
5 that we were paying for, if raw materials costs are going up,  
6 cost of the business is going up. So there would be cost  
7 increases that we put some identification of what exactly was  
8 going on in cost and --

9 Q And did you always make sure that the things that were said  
10 were true before you signed those letters?

11 A I would look at them, read the letters. Also there would  
12 be a check-off list from the marketing people and also legal  
13 that everything we put in there had been checked off. We  
14 didn't create a letter just by itself, we had a check-off list  
15 and we had to approve the letter on a price increase or price  
16 notification before we sent it out.

17 Q Do you have any doubt that the letters you signed were  
18 accurate and true?

19 MR. JOHNSON: Objection. Leading.

20 A The letters --

21 THE COURT: No, just a moment.

22 I'll allow it. But go ahead, let me hear.

23 A Can you ask the question again? I got --

24 Q I asked whether or not -- whether or not the letters were  
25 accurate and true.

1 A Yes. We had everything checked off with legal and  
2 everything else. We always felt the letters were accurate and  
3 true for the time period that they were sent out.

4 Q Let me ask you about the timing of these letters. How  
5 often, generally, would you put out the letters?

6 A The letters -- there was a stipulation. A lot of the  
7 customers had requirements you had to have 30-day notification.  
8 They needed 30-day notification of any type of price increase  
9 because they had to do something to increase the price with  
10 their customer base.

11 So typically when we're looking at it, it was in the  
12 45-day period to the day of implementation. So we had to have  
13 15 days in between the announcements because the contracts with  
14 a lot of customers required 30-day notice, and some of the  
15 contracts required 30-day notice on a quarterly basis.

16 Q Let me you unpack that a little bit.

17 So your customers had a contract with you that said  
18 every quarter 30 -- between 30 and 45 days before that you have  
19 to give us notice of any increase in price?

20 A They didn't have the 45 days. They just had the 30-day  
21 notification of any type of price increase for them. And  
22 typically the reason was, they needed that 30-day notification  
23 that you're doing something with your prices so they can take  
24 our information on price increases --

25 Q Let me stop you right there. In terms of the quarterly



1 aspect of that, was that also in the contract?

2 A Yes, a lot of the contracts had quarterly price protection.  
3 So you couldn't raise your price every quarter, it to be done  
4 on a quarterly basis, and there were several that had on a  
5 six-month basis.

6 Q And did many of your customers have competitors as also  
7 their suppliers?

8 A We always had competitors, yes.

9 Q So they might have contracts with your competitors as well?

10 A Yes.

11 Q Did you, in fact, know from your talking to your customers  
12 whether they did or did not have contracts with your  
13 competitors?

14 A Some of our customers had contracts for volume with other  
15 competitors, yes.

16 Q And do you know whether the contracts that your customers  
17 had with the competitors had similar provisions about 30 days  
18 before the end of the quarter you've got to announce the price  
19 increase?

20 A Yes. That was ongoing in the industry because our  
21 customers had to give notification to their customers.

22 Q But in terms of your knowledge, did you talk to your  
23 customers about what was going on with your competitors?

24 A The information about what our competitors were doing with  
25 our customers was information I got from the customers, they'd

1 relay the information to me. Typically it would be in a phone  
2 conversation or a meeting, they would relay what was going on.  
3 All of our major customers had more than one supplier.

4 Q And in terms of -- in terms of how the customers would sort  
5 of get this information from you, would they just -- a big  
6 customer, just one day a letter shows up in the mail and they  
7 open it up and it tells them their prices are going up? Or how  
8 did this work in the real world?

9 A No, the major customers, there was a phone conversation  
10 with them ahead of time, and sometimes there was a discussion  
11 about what was going on in the industry. But the major  
12 customers would get a phone conversation. If it wasn't from  
13 me, it would be their key seller client on those particular  
14 accounts, so they wouldn't get a surprise letter in the mail  
15 about a price increase.

16 Q And was there ever a time when one of the business managers  
17 came to you and said: "Price increase announcement, \$.07. Do  
18 it now"?

19 A Not that I recall, no.

20 Q And would that even have been possible given the process  
21 you described?

22 A No.

23 Q Why not?

24 A The process of raising the prices in that team, the  
25 polyurethanes, had to go into the sort of the committee for

1 both business managers involved in that plus Bob Wood and so  
2 forth. So there was a check-off thing that had to be checked  
3 off before it was given to the sales organization to implement  
4 a price increase.

5 Q And then I want to talk about sort of what happened after  
6 you send the announcements out.

7 What then happens? Describe what happens next with  
8 your customers. What's the dialogue that then happens once the  
9 customers get the announcement?

10 A Well, depending on the customer, some can tell me they're  
11 going to throw it away, just discharge it, just get rid of it.  
12 Okay. But in reality they would like to have the letters  
13 because they would use us as information.

14 Q I want to stop you before you go any further on that.

15 I want to talk about the dialogue that you had with  
16 the customers after they got the price increase letters.

17 Can you describe -- give us an example of a phone call  
18 you'd get from a customer after you sent out a letter?

19 A Well, you'd get a customer calling back saying: We're not  
20 going to accept this.

21 There would be a dialogue, what are we doing and so  
22 forth. So there would be an ongoing dialogue back-and-forth of  
23 why we're doing it, the cost and so forth. And what was  
24 happening in the marketplace.

25 Q What, if anything, would they tell you about what your

1 competitors were doing?

2 A They'd tell me exactly what their competitors were doing,  
3 and there could be times where, yeah, we saw your price  
4 increase but the other guy is not going up the same amount.

5 Q And did you -- what was your source of information ever  
6 about what the competitors' price increase announcements were?

7 A Well, the source was from our own customer base. If they  
8 got a call from our competitor saying the price was going up,  
9 they'd probably relay it back to us relatively fairly quick in  
10 the conversation to see exactly what we were doing with our  
11 product mix.

12 Q And what would you do with that information once a customer  
13 came back and said: Hey, so-and-so is going up this amount,  
14 what would you do?

15 A Would -- would dialogue with our team to tell them that  
16 something was going on, that the prices were going up you at  
17 this particular account and so forth.

18 Q And then I want you to describe the process that goes next  
19 with the customer. How do you then ultimately arrive at the  
20 price that's going to be charged? Describe that process to us.

21 A Well, after the price increase announcements with the major  
22 customers, there then would be a dialogue. It would either be  
23 a conference call with them or there would be a face-to-face  
24 meeting as we reviewed what was going on with the pricing  
25 structure and what their needs were.

1 Q And what would -- how long would that process last, that --  
2 after the announcement increase letter process last?

3 A Sometimes the conversation went -- went on before the  
4 letter actually got to them because we notified them ahead of  
5 time. So that could have gone on immediately and would follow  
6 almost through the entire 30 days after the price increase  
7 announcement because there could be gamesmanship played on  
8 exactly what was going on with those price increases.

9 Q When you say "gamesmanship played," what do you mean?  
10 Spell that out a little bit.

11 A We could announce a six-cent a pound price increase to a  
12 major customer, but maybe the competitor came in with something  
13 less than the \$.06 trying to increase volume at that particular  
14 time. So sometimes you got situations where it wasn't exactly  
15 implementing the total package of your announced price  
16 increase.

17 Q And when you say -- first of all, did every price increase  
18 announcement, you know, go for the full amount?

19 A No.

20 Q Were there some of them that went for nothing?

21 A Some deteriorated and did go for nothing, correct.

22 Q And then did you have some in between?

23 A There would be some that came in less and there also would  
24 be some that might have, instead of getting on the first  
25 quarter would be delayed almost 90 days to a second quarter.

1       There were certain industries where their volume of business  
2       was better in certain parts of the year than in others.

3       Q     So, I want to ask you about two things you said there.  
4       Number one, you know, when the price would come in somewhere in  
5       between. How would you get there? How would you get there  
6       with the customer? Describe the dialogue you had with the  
7       customer to get to a price.

8       A     Well, typically if we announced a price increase and it was  
9       there and the competition came in with something different,  
10      there would be an ongoing dialogue with the customer telling  
11      them exactly what's going on and what the other guy was doing  
12      as far as his pricing and when he was -- he would implement his  
13      price increase.

14      Q     What about when the competition came in with the same  
15      thing, would you still have a dialogue?

16      A     Always had a dialogue. And the dialogue always went on  
17      with the customer because it impacted their part of the  
18      business and their margin, so they wanted to know something on  
19      it.

20      Q     And you mentioned something about delaying price increases  
21      sometimes for 90 days.

22      A     Sometimes.

23      Q     Tell me how you would get to that process.

24      A     Well, sometimes you go in with a price increase, it  
25      wouldn't be exactly working out, there would be some

1 stipulations, you need a total understanding in the marketplace  
2 what was going on. There might be a delay, impact in the  
3 marketplace. Instead of going up July 1st it might go up  
4 October 1st. So there could be a delay in it. You did also  
5 sometimes get information from the customers how to handle the  
6 information, what other activity was going on with them.

7 Q I want to ask you to focus on some of the allegations in  
8 this case.

9 A Okay.

10 Q First of all, did you ever agree with a competitor about  
11 the price you were going to charge?

12 A No, never did.

13 Q Did you ever even talk to a competitor about what price you  
14 were going to charge?

15 A No, I never did. Except BASF was one of our customers, so  
16 when we were announcing price increases to BASF in Michigan, we  
17 had to tell them what our pricing structure was going to be to  
18 them since they were buying the product from us that they  
19 didn't make.

20 Q Did you ever hear about any kind of agreement by anybody on  
21 your team with a competitor on the prices that would be  
22 charged?

23 A No, I didn't hear anything about our people talking with  
24 the competitor about a price we were going to charge, no.

25 Q Did you know exactly what the prices were that your

1 competitors -- the actual prices they were charging your  
2 customers?

3 A You get that feedback from the customer what the actual  
4 price that they were being charged by our competitors at those  
5 prices in certain market segments.

6 Q Were there some times that they wouldn't give you that  
7 information?

8 A Typically no. Typically they were saying, if the  
9 competition had a lower price they would give you the price  
10 information and say that your price is a penny a pound higher  
11 than theirs or two cents a pound higher or something along  
12 those lines.

13 Q Was there -- was there ever a time when Mr. Churet, in  
14 particular, came to you and told you you've got to implement  
15 this particular price increase announcement?

16 A No.

17 Q During the time when you -- you, from 1994 to 2003,  
18 where -- Mr. Churet -- you mentioned Europe. Where was Mr.  
19 Churet physically located whenever he was part of this process?

20 A Well, during that reporting he was in Europe, but he did  
21 come to the U.S. for some meetings and so forth, yes. So he  
22 would come over to the U.S. for those meetings. But the chain  
23 of command was a little bit different in how we did our  
24 pricing. He just couldn't authorize a pricing. It had to go  
25 through the business team there. At that time it would be



1 Marco Levi and Stephanie Barbour.

2 Q You gave some prior testimony about -- about 40 to 50  
3 percent of price increase announcements. When you gave that  
4 testimony, what were you talking about? What were you  
5 referring to when you said 40 to 50 percent of price increase  
6 announcements?

7 MR. JOHNSON: Objection. I think that testimony  
8 speaks for itself.

9 THE COURT: I'll allow it.

10 Go ahead.

11 A That was in a long conversation, testimony given several  
12 years ago. And when I said 40 or 50 percent of the time, we  
13 sometimes got a price increase, a lot of times we did not get a  
14 price increase.

15 Q And when you say 40 to 50 percent, are you referring to the  
16 whole thing or part of the thing?

17 MR. JOHNSON: Objection. Leading.

18 THE COURT: Rephrase the question, Mr. Streeter.

19 Q When you said 40 percent of the time we got some price  
20 increase, what were you saying? What did you mean? What were  
21 you thinking?

22 MR. JOHNSON: Objection. The testimony speaks for  
23 itself.

24 THE COURT: He answered that already. Yeah, he  
25 answered that.

1 MR. STREETER: All right. I'll move on.

2 Q I want to talk about the relationship that you had with  
3 your customers. Which of your customers were your biggest and  
4 most important customers in the polyurethanes business?

5 A In what period of time though? Firestone was one of the  
6 bigger ones at one time, General Foam.

7 Q '94 to 2003.

8 A '94?

9 Leggett & Platt was one of your bigger customers and  
10 we did a lot of business with Leggett & Platt over the years,  
11 had a good working relationship with them. We did some  
12 business, a little bit differently with Woodbridge. Woodbridge  
13 of course was more in the molded rather than the flexible slab  
14 industry.

15 Q Describe for the jury a little bit about the relationship,  
16 for instance, that you had with the people at Leggett & Platt.  
17 Who did you deal with and what was the nature of your  
18 relationship?

19 A Well, I dealt with Larry Heppe when it involved -- Leggett  
20 & Platt actually bought that part of the business down in  
21 Texas. And there was a Duane Potter involved. Joe York and so  
22 forth. So there was the core people in Missouri that were  
23 involved. And then overall, Larry Heppe and Joe York were  
24 heavily involved because that's where we went later to  
25 negotiate what we were selling them.

1 Q And can you describe what relationship you had with Larry  
2 Heppe?

3 A The relationship with Larry Heppe was relatively pretty  
4 good. It was one of those things that we worked together for a  
5 long period of time. When you'd go down there, I stayed at his  
6 house rather than the hotel and we did a lot of things  
7 together. I took him snowmobiling in Yellowstone Park -- he  
8 had never done that before -- in the cold of January.

9 So I had a good working relationship with Larry Heppe.  
10 I had a good relationship with Leggett & Platt over the years  
11 because even at one time they talked about hiring me to go to  
12 work for them.

13 Q And how about, how about Carpenter, did you ever talk to  
14 Carpenter about the same thing?

15 A I talked to Carpenter. We developed a relationship and  
16 started -- Carpenter was also a little bit of a propylene oxide  
17 customer so they bought isocyanate products. They were not a  
18 large customer of ours because they made some of their own, but  
19 they had products they needed to buy from us that they didn't  
20 make in their own chain of command. The Carpenter relationship  
21 started out well, developed over the years. And when I left  
22 Dow, Carpenter invited me down as a possibility of going to  
23 work for them.

24 Q And the Polyurethane Foam Association, what's that?

25 A There was -- the Polyurethane Foam Organization was really

1 made up of all the flexible slab foamers in the industry.

2 Q So your customers?

3 A They were customers of ours but some of them weren't  
4 customers of ours. So it was made up of all the flexible slab  
5 customers in the industry. This was the PFA. And they had  
6 their own manager of the PFA and they had their own sort of  
7 board and team, and they'd also set up individual yearly  
8 meetings someplace where you'd get together and have  
9 conversations.

10 I was put on the board several times on those boards.  
11 There was a time I was on it for several years, off, and put  
12 back on the board.

13 And typically it was made up of the foamers, but they  
14 did have people on their steering committee that were actually  
15 suppliers to the industry.

16 Q How many suppliers did they have on their steering  
17 committee?

18 A Two at a time.

19 Q And you were one of them?

20 A Yes.

21 Q So this is -- you're on a committee set up by your  
22 customers, and you're the one of two suppliers?

23 A Right. Set up by the customers, not by the suppliers.

24 Q I want to turn to some of -- let me ask you to now focus on  
25 putting this price increase announcements aside. I want you to

1 focus on the contracts.

2 You're sitting down to negotiate a contract with a  
3 customer. Can you describe that process?

4 A It was an in-person meeting rather than across the  
5 telephone, so you had a conversation sit-down. And what you  
6 were trying to do was make sure that you had the volume so that  
7 your plants were running at a certain capacity over a period of  
8 time. So you'd look at a contract with a major customer  
9 saying, hey, we want a contract with you to supply you these  
10 grades of polyol, it could be TDI or MDI, but this grades of  
11 our polyurethane material for a certain period of time.  
12 Typically it could be two to three years, knowing that they  
13 would be buying from you at a consistent rate which would help  
14 you run your plants over a period of time, yes.

15 Q And how about the pricing and the contract, can you  
16 describe the conversation you had around that?

17 A You'd have pricing in the contract, and that's typically  
18 where you got the deal where you had to give them 30-day  
19 notification on a quarterly basis because they had to have that  
20 information in order to be successful in their businesses.

21 So you would have to talk about the timing of those  
22 increases, and you looked at when it timing best, and then you  
23 would also look at a little bit of what the pricing structure,  
24 but also the volume that they'd be willing to purchase from you  
25 in a given year.

1 Q When you say "pricing structure," what do you mean by that?

2 A By the pricing structure?

3 Q Yeah.

4 A Well, typically you could have a pricing structure based on  
5 here's what the volume is and here's what our prices are going  
6 to be in the marketplace. So you'd be quoting a price, and  
7 then with reservations. That's where you had the situation  
8 where they could raise it instead of on a quarterly basis. So  
9 here's your price. We couldn't raise your price, we have to  
10 give you 30-day notification on a quarterly basis.

11 Q And describe the negotiation that you had actually over  
12 price. Tell us about that negotiation that you had.

13 A Well, you typically had the pricing negotiation because you  
14 were there with your prices, you had the competition with their  
15 prices because all these conferences involved more than one  
16 supplier. So you would be talking about, those are their  
17 prices, here what's your prices are, what-are-you-going-to-do  
18 type of situation.

19 Q And how about, how about volume discounts, can you explain  
20 what those were?

21 A What we did was look at, if you're going to buy, you know,  
22 say, 100 million pounds of product from us, we'd work at,  
23 here's your price, hold the price. But if you reach those  
24 goals, then we'd give you some free goods as a reward for  
25 buying that many millions of pounds of product from us. At --

1 Q And what's a rebate?

2 A Well, the rebate was sort of the free goods that you gave  
3 to the customer for meeting those.

4 Q Were there rebates in forms other than free goods?

5 A My recollection was, there was a couple that you might have  
6 given them a credit rebate and then they could apply it against  
7 their previous invoices. But sometimes it was a little bit,  
8 we'll give you a rail car, a product, but it could also be that  
9 we accumulated a credit that they deserved that they could  
10 apply against their invoices.

11 Q If they hit a certain volume?

12 A Yes

13 Q And why would you want to do that? Why would you want to  
14 hit a certain volume?

15 A Well, typically what you want to do with your plants, you  
16 had to have a certain product coming out of your plants to make  
17 the plant efficient. You didn't want to come back with a plant  
18 at a low capacity and sometimes buying the raw materials if the  
19 plant wasn't at that capacity. You still needed to plan for  
20 the times for the raw materials you weren't using.

21 So what you would try to do was have contracts to  
22 supply to customers. So you made sure the plant was running at  
23 an efficient rate and being profitable, not being a cost  
24 disadvantage to you.

25 Q Did you ever give percentage rebates?

1 A Percentage of what they --

2 Q Percentage of the costs. In other words, that -- what you  
3 charge them.

4 A Sometimes what you did on the pricing, you could give them  
5 like a one percent discount or a two percent discount for the  
6 product they buy. So there were times where you would have a  
7 percent discount rather than giving them the free goods.

8 Q I want to talk a little bit about the competition. Who  
9 were your big competitors in the polyurethanes business from  
10 '94 to 2003?

11 A The two biggest competitors of course were Bayer and BASF.

12 Q And BASF was also a customer?

13 A BASF was a customer based outside of Detroit. They didn't  
14 make all the products they needed for their applications that  
15 they were dealing with the automotive people, so, yes, they  
16 were a customer but they were also a major competitor in other  
17 areas.

18 Q I want to focus in on some documents.

19 MR. STREETER: Going to ask that DX-2968 be put up on  
20 the screen. This is already admitted into evidence.

21 Can you blow up the very top of the document so we can  
22 see the addressee.

23 A Can you get it so I can read it?

24 Okay. Thank you.

25 Q Can you read that?



1 A Yes, I can.

2 Q So who is -- it says it's from Terry Clements. Who's that?

3 A Teri Clements was my office assistant secretary.

4 MR. STREETER: And if we could, you know, actually  
5 just quickly go to the last page of this document and blow up  
6 the last lines.

7 All the way down to who it's from.

8 Q This is from you?

9 A Yes.

10 Q And your secretary sent it on your behalf essentially?

11 A Yes.

12 Q Okay.

13 MR. STREETER: Let's go back up to the people to whom  
14 it was addressed.

15 Q First of all, the date. When is this?

16 A June 13th, 2001.

17 Q And this group of people, can you --

18 MR. STREETER: Can you highlight that name right  
19 there.

20 Q Stephanie Barbour.

21 A Correct.

22 Q You mentioned she was one of the sort of the team members?

23 A Stephanie Barbour and Marco Levi, yes.

24 Q And his name is on here too I think. Right there  
25 (indicating).

1 A Yeah.

2 Q And you mentioned Bob Wood. Is that him right there?

3 A Right.

4 Q And David Fischer right there?

5 A Right.

6 Q So you're sending a message through your secretary to this  
7 whole group of people. Right?

8 A Big group, yeah.

9 MS. STREETER: Okay. Now let's go down to the  
10 bottom half of the page and blow that up.

11 If you could highlight the first sentence.

12 Q Right here. (Reading) We have witnessed a very aggressive  
13 attack by our competition over the past several months which  
14 has impacted our overall volume and net unit return.

15 What do you mean by a "very aggressive attack by your  
16 competition"? What does that mean?

17 A Well, if I'm saying "very aggressive attack," that means  
18 they're aggressively going after some of our competition in  
19 order to get volume.

20 Q And how did you find out that was happening?

21 A Typically it would be from the customer who was telling us  
22 what's going on, but also you would see that in certain cases  
23 the volume you were shipping to a particular customer decreased  
24 dramatically.

25 Q And when you say they're going after some of your volume,

1 when would you learn about how they were doing that?

2 A From the customer.

3 Q But how would -- what would you learn about how the  
4 competition was doing that? How were they going after your  
5 volume?

6 A Typically the customer would tell me about it.

7 Q And what would they tell you that?

8 A That the competition is coming here and we repositioned  
9 ourselves for some volume with them.

10 Q And what would they tell you about why they would go with  
11 the competitor as opposed to you?

12 A Well, at times they would tell me that they had made a deal  
13 and the deal was probably price or free goods or something  
14 along those lines.

15 Q And what would you do in response to that situation?

16 A Well, they probably made an agreement to buy certain  
17 product from them. So you can see our volume is dropping  
18 dramatically especially in the polyol area, so the market  
19 became very aggressive in the polyol area, so there was  
20 activity at certain accounts that we were losing business to.

21 Q What would you do in response to that situation?

22 A Well, in response, if we lost some business, you'd look  
23 around in the marketplace and try to figure out where you could  
24 increase your volume either with your current customers or  
25 would there be a customer that you had been doing business

1 with, could you promote some activity to start getting a  
2 secondary position.

3 Q And how would you promote getting, you know, getting a  
4 position with a new customer?

5 A Well, typically you'd make a call do them and start talking  
6 to them, try to find out what the pricing structure was with  
7 them, see if you could meet the price, ask for part of their  
8 business or something like that.

9 Q And would you ever try to win back the business your  
10 competitor was taking from you?

11 A You sort of went in and had to dialogue with them to see  
12 what had happened, why you lost the business.

13 Q When you say "them," what do you mean?

14 A The customer themselves. So you'd have to dialogue with  
15 the customer: What has happened? What has caused us to be  
16 falling out of grace with you that you've moved to somebody  
17 else?

18 Q Would you ever try to get that customer back?

19 A Over a period of time, yes. You probably -- there were key  
20 customers in certain areas that you wanted to work with very  
21 closely. Like, say, in the automotive industry, if the  
22 automotive industry was expanding, you had products going into  
23 the automotive industry, so you wanted to work with the  
24 automotive companies that were sending into the automotive  
25 people if the automotive industry was increasing, yes.

1 Q How would you go about trying to get a customer back?

2 A Probably you go and talk to them in person.

3 Q What would you say to them?

4 A What can we do in order to regain our position? What can  
5 we do --

6 Q What kind of things would you offer them?

7 A Would you ask the question again?

8 Q What kind of things would you offer to them?

9 A Well, sometimes we'd offer them new product mix. We could  
10 offer them a volume paper for free goods if they hit certain  
11 volumes and so forth. So there was sort of a buy-in-on-it  
12 scenario.

13 Q What about discussion of prices?

14 A Well, we could talk about the pricing, look at what the  
15 pricing structure was and so forth.

16 Q When you say "look at what the pricing structure was,"  
17 what --

18 A You have to look at what the pricing structure was with  
19 that particular customer and see what they were offering and if  
20 it made sense to you --

21 Q Now --

22 A -- to try to meet the competitive --

23 Q And would you ever try to beat the competitor?

24 A On the pricing structure?

25 Q Yeah.

1 A No. What we really tried to do is be a better supplier and  
2 be a North America company that was supplying them and had  
3 major facilities with multiple products. A lot of the  
4 customers could then buy different polyols from you for  
5 different applications. Like, you could be a co-polymer along  
6 with a conventional polyol going into a flexible slab  
7 formulation.

8 So sometimes you're able to use your product mix to  
9 help you with a customer when a competitor only had a couple.

10 Q Let me ask you to look at the bottom of page --

11 MR. STREETER: If you could highlight this sentence  
12 that begins: "However."

13 Q You say: (Reading) We are cognizant of the fact that Bayer  
14 and BASF are being aggressive and could impact us.

15 What are you referring to there?

16 A Well, that was MDI. We were looking at impact both as to  
17 lamination and the forest products.

18 There were so many different markets and sometimes  
19 there's different MDIs going into different market segments, so  
20 if you're looking at that we're saying, gee, you can see the  
21 fact that Bayer and BASF are getting aggressive in those market  
22 segments.

23 Q And when you say "aggressive," what do you mean?

24 A Well, that they were probably being aggressive and trying  
25 to get more volume.

1 Q How?

2 A I would assume that they were trying to do something with  
3 either a different price or maybe a free goods buy-in.

4 Q And let me ask you to turn to the second page, TDI. It's  
5 up at the top of the page.

6 MR. STREETER: Blow that up.

7 Q And there's that: "We will increase our efforts" sentence.

8 MS. STREETER: Would you highlight that.

9 Q You write: (Reading) We will increase our efforts for new  
10 tank car TDI business at Woodbridge, Flexible Foam and  
11 Carpenter and Foamex.

12 What would go into you increasing your effort? How  
13 would you go about doing that?

14 A For one reason, those customers took tank cars. Shipping  
15 tank cars over the road was the safe way to do it; putting it  
16 in trucks was not. So we had special tank cars with top  
17 unloading and everything, and it was protected.

18 With those accounts, they bought a lot of tank cars of  
19 TDI on locations that we could deliver the tank cars to safely  
20 and make quick delivers to. So we looked at those accounts,  
21 and they were all large users of TDI that took it in tank cars  
22 versus accounts that might be taking it in tank trucks.

23 Q So what kinds of things would you try to do to get those  
24 accounts?

25 A Well, if you're looking at it, we'd look at what their

1 pricing structure was. We were buying the TDA, so we had to  
2 move TDI or we'd have to pay the TDA for non-use. So we'd look  
3 at what their pricing structure was. And would we be  
4 competitive? Would there be something we could offer them in  
5 return for getting their business?

6 Typically we did a little more of: Buy this volume,  
7 we'll give you a free goods type thing rather than actually  
8 doing something like negotiating a lower price.

9 Q Let me ask you to turn to DX-1055, which is pre-admitted.

10 MR. STREETER: And if you could, blow up the bottom  
11 half of the page starting there.

12 Q This is an email from Michael Ragar. You see that?

13 A Yeah.

14 Q Who's that?

15 A He was a salesman on the West Coast.

16 Q And that's you right there, one of the people --

17 A Right.

18 Q -- it was sent to?

19 Were there other folks in the sales organization?

20 A Right.

21 I'm not really familiar with Mike McCurrie that much.

22 Q Turning to the first sentence.

23 MS. STREETER: If we can highlight that.

24 Q It says: (Reading) Rick, Mike and Bill: Attached is a  
25 polyol price increase announcement from BASF indicating a



1 five-cent per pound price increase on all pluricol polyol  
2 products.

3 Is this the typical kind of way you would learn about  
4 a price increase announcement, from a salesperson in the field  
5 or from a customer?

6 A Yes.

7 MS. STREETER: And then, go ahead and highlight this  
8 last sentence: "Though BASF has made this announcement."

9 Q It says: (Reading) Though BASF has made this announcement,  
10 I can find no indication they have made attempts to support the  
11 announcement in the ridged or CASE business.

12 What does that mean: "No efforts to support the  
13 announcement"?

14 A Sometimes they made the announcement in one market segment,  
15 not all the market segments. What he indicated was the ridged  
16 and CASE businesses, okay? So he overlapped in different  
17 market settings --

18 Q Let me just ask, what do you mean by --

19 MR. JOHNSON: Your Honor, I would like him to finish  
20 his answer.

21 MR. STREETER: Okay.

22 THE WITNESS: Could he ask the question again, please?

23 THE COURT: Go ahead. Ask the question, Mr. Streeter.

24 Q The question is: What did you mean, or what did you  
25 understand it meant when it says: "No indication they have

1 made attempts to support the announcement?"

2 A That BASF might have made the announcement but they didn't  
3 really raise it to their customers.

4 Q And then I want to highlight the next sentence here  
5 beginning with "Laura Breen."

6 It says: Laura Breen -- by the way, who's Laura  
7 Breen?

8 A She was a salesperson in the field selling.

9 Q (Reading) Laura Breen had discussions with Masco Corp.  
10 today and was told BASF has a lower price on pMDI than our  
11 current \$.71 (indications were \$.69) and had not made the  
12 announcement to Masco.

13 So what is this telling you about what BASF is doing  
14 on pricing compared to you?

15 A Well, looks like they didn't go to all their customers with  
16 the price increase.

17 Q And what are they offering this customer compared to what  
18 you're offering?

19 A Well, looks like we were \$.02 a pound higher according to  
20 what Lauren Breen heard from the customer.

21 Q And?

22 A As I read through the thing further, you can see that it  
23 looks like Mastro has the Dow and Bayer MDI price increase  
24 letters but nothing from BASF.

25 Q Let me now turn over to the next page and pull off that

1 paragraph right there.

2 It says: (Reading) My recommendation in June was \$.79  
3 a pound. System price which was based on \$.71 a pound.

4 And then at the bottom it says: (Reading) It now  
5 appears that \$.79 a pound may not be competitive if BASF  
6 continues with what appears to be a strategy to secure the  
7 total volume at Masco.

8 What does that mean, "\$.79 may not be competitive"?

9 A That our price was high versus what BASF has.

10 Q And what does that mean to you --

11 MR. JOHNSON: Your Honor, objection. Relevance.  
12 There's nothing about Systems in this case. There's no  
13 allegation of any price-fixing with respect to Systems, it's  
14 not even an allegation in this case. That's a Systems price.

15 THE COURT: All right. Mr. Streeter?

16 Q Is Systems part of the overall polyurethanes business?

17 A You sell polyurethanes into the Systems business, yes.

18 Q You sell polyols into the Systems business?

19 A Yes.

20 Q So this is a customer to whom you're selling polyols?

21 A It's a name. I'm not exactly sure goes it back too far. I  
22 mean --

23 Q Understood. I'll move on.

24 A It's 16 years ago. I'm not --

25 MR. STREETER: I'll move on, your Honor.

1 THE COURT: All right.

2 MR. STREETER: If we could put defense Exhibit 3872  
3 up.

4 By the way, I offer DX-10554.

5 THE COURT: Is there any objection?

6 MR. JOHNSON: No objection, your Honor.

7 THE COURT: All right. It's in evidence.

8 MR. STREETER: Could we put DX-3872 up.

9 Q This is an email from you. Is that right?

10 A Yes.

11 Q And who is it to?

12 A Frank Hurst.

13 Q Who's Frank Hurst.

14 A He's at E.R. Carpenter, one of the major managers there.

15 Q And I want to highlight these two paragraphs right here.

16 First of all -- here we are.

17 You write to him: (Reading) I really got hammered in  
18 July. Didn't realize how aggressive Huntsman, Lyondell and  
19 BASF were going to get. Lost a ton of orders.

20 What were you referring to there?

21 A We lost a bunch of business.

22 Q Do you know how or why?

23 A Well, I got a feeling that if you look at -- there might  
24 have been a July 1st increase, and this was July 20th, okay?

25 So I didn't really how aggressive Huntsman, Lyondell and BASF

1       were going to be. So we lost orders in that particular month.

2       Q     When you say "how aggressive they were going to be," what  
3       do you mean by "aggressive"?

4       A     Well, it looks like they took some of our business from us  
5       at certain accounts that we had, so --

6       Q     Did you learn from your customers as to how they did that?

7       A     Over a period of time we probably learned from each  
8       customer why we lost their volume.

9       Q     And what kinds of things would you learn from the  
10       customers?

11       A     It could be that our price was slightly higher announced  
12       than theirs, or there was some other activity, like a delay in  
13       the price increase.

14               MR. JOHNSON: Objection to the speculation. Anything  
15       could have been.

16               THE WITNESS: Yeah.

17               THE COURT: Sustained. Strike the answer, please.

18       Q     What kinds of things did your customers tell you about why  
19       you lost business?

20       A     That your price wasn't accurate to what the competition we  
21       could buy it from.

22       Q     And what about -- you mentioned something about free goods.  
23       What about that?

24       A     Free goods didn't go into a whole bunch of customers, but  
25       there were sometimes where free goods were given as a

1 stimulation to sign a contract or get extra volume.

2 Q The bigger customers, or which customers?

3 A The bigger customers, yeah. There could also be a small  
4 customer that was having a new product developed and you'd  
5 actually give new product to that application so they could  
6 expand their product mix.

7 Q I want to turn to Carpenter, which this -- you know, this  
8 document is to Frank Hurst.

9 What kind of relationship did you have with Carpenter?

10 A It started out a little bit that they were competitive  
11 because they could make some polyols of their own and could use  
12 it internally and so forth, but they also needed TDI and MDI  
13 for some of their applications.

14 So started calling on them, developed a relationship,  
15 worked with Stan Pauley and a grew over a period of time. And  
16 when they needed certain polyols they didn't make or needed TDI  
17 they didn't have, they were willing to come to Dow and talk to  
18 us about buying products from us.

19 Q Let me ask you to turn to DX-3060.

20 MR. STREETER: And I want to blow up the top part of  
21 the document there.

22 Q This is you right here. Right?

23 A (No response).

24 Q And you're writing Frank Hurst at Carpenter?

25 A Right.

1 Q Let me ask you to focus right here. You say: "We will  
2 come in with a TDI price just for Carpenter. It will not be  
3 given to others. We can hide the true number."

4 Do you see that?

5 A Correct.

6 Q What does that mean: "We'll come in with a TDI price just  
7 for Carpenter"?

8 A Well, we're working with Carpenter and we're going to sell  
9 them TDI to certain of their locations at a certain plant --  
10 price.

11 Q And when it says "just for Carpenter," what do you mean by  
12 that?

13 A Well, that's the price to those plants would be just the  
14 TDI going to their -- to Carpenter at those plants, yes.

15 Q "It will not be given to others." What do you mean by that?

16 A Well, TDI is a delivered price, so you look at where the  
17 price is on a delivered basis to an account. So if it's a  
18 close plant, you're not paying for all the freight for a rail  
19 car to go a long ways and back because it's a delivered price.

20 Q So what did it mean, "it will not be given to others"?

21 A Well, we signed a deal with Carpenter: Here's your TDI  
22 price for this product going to this particular plant. We  
23 looked at the dynamics and economics, and this will be a price  
24 shipping to that plant.

25 Q And you say --

1           MR. STREETER: If you could highlight the next  
2 sentence: "I know that you can keep the confidence."

3       Q     (Reading) We can hide the true number. I know that you can  
4 keep the confidence."

5           Why would you want Carpenter to keep your price in  
6 confidence?

7       A     Well, you had to look at it very carefully. Sometimes you  
8 had a price across the board, and some plants cost you a lot  
9 more to get the product there. So you had to have a lot of  
10 information. This price was going to a particular plant.  
11 Okay? And so the freight cost would make a different net  
12 return that you were paying to the railroad company.

13       Q     Let me just ask you to focus: Why would you want Carpenter  
14 not to disclose your price?

15       A     Because we were making a deal to sell them some TDI on a  
16 special deal to them.

17       Q     And who would you not want to find out the price?

18       A     Well, he had two other competitors that were selling a lot  
19 of TDI to them, more than us, Lionell and BASF.

20       Q     And why would you not want your competitors to find out the  
21 price you were offering?

22       A     I thought we were making a special deal for Carpenter just  
23 for this amount of volume in order to help our TDI plant move  
24 that byproduct that comes into it. TDI was a lot harder to  
25 sell because we could only sell to certain people in rail cars.



1 We were not -- we didn't selling in tank trucks in case there  
2 was a problem.

3 Q How about your other customers, did you want your customers  
4 to know the prices you were charging -- did you want one  
5 customer to know the price you were charging to another  
6 customer?

7 A No.

8 Q Why not?

9 A Individually we worked out a deal with each customer what  
10 the competitive price was and what our price was, what the  
11 volume was, and if there was some sort of volume rebate for  
12 large volumes of product.

13 Q Why wouldn't you want one customer to know what another  
14 customer was paying?

15 A We wouldn't go to a customer and tell them what E.R.  
16 Carpenter was paying for the product because we probably would  
17 be getting a price from them and being competitive. So we  
18 wouldn't relay information between us and the customer if they  
19 had a deal, we kept it between the two of us as a relationship  
20 thing.

21 Q If you had one customer you were charging \$.62 to and  
22 another customer you were charging \$.58 to, would you want the  
23 one that you were charging \$.62 to know that you were charging  
24 a lower price to someone else?

25 MR. JOHNSON: Objection. Leading.

1           THE COURT: It is. Rephrase the question, Mr.  
2 Streeter.

3       Q    When you had customers who were charged different prices,  
4 did you want -- what did you want -- you know, the one that was  
5 paying the higher price, did you want them to know someone was  
6 paying a lower price?

7       A    Not necessarily, no. Because there were times we were  
8 meeting a competitor price for a particular part of the  
9 business. You wouldn't take the competitor price over here and  
10 give it to somebody else. There was an agreement that here's  
11 my price. Will you meet this price?

12           So you had an obligation to the customer that  
13 presented you the paperwork of what was going on to meet that  
14 price and not present it to across the industry.

15       Q    Let me ask you to turn to Hickory Springs.

16           What was your relationship like with Hickory Springs?

17       A    It worked out fine. Called on them over the years. We're  
18 more of a secondary supply to Hickory Springs because they were  
19 competitors against Foamex and Leggett & Platt and so forth.  
20 So sometimes the customer would know that you're a major  
21 supplier to their competitors, so we were a secondary supplier  
22 to Hickory Springs over the years.

23       Q    And who was that primary supplier?

24       A    At the time I thought it was BASF was more the primary  
25 supplier.

1 Q And who did you deal with at Hickory Springs?

2 A Well, Neil Underdown was there, and than his son was  
3 brought in, David Underdown. So I went far enough back that it  
4 started out with Neil, and David his son came in but became a  
5 more active role at Hickory Springs.

6 MR. STREETER: And I want to ask -- I want to ask you  
7 to pull up Defense Exhibit 1371.

8 By the way, your Honor, I offer DX-3060 which was the  
9 last exhibit we looked at.

10 THE COURT: Any objection?

11 MR. JOHNSON: No objection, your Honor.

12 THE COURT: Okay. Then it's in evidence.

13 MR. STREETER: If you could just blow up that whole  
14 string there, that whole email.

15 Q First of all, who is Ellen Gustafson?

16 A Ellen Gustafson was the salesperson calling on Hickory  
17 Springs working out of Atlanta, was her sales office.

18 Q She worked for you?

19 A Direct report, yes.

20 Q And that's you being copied?

21 A Yes.

22 Q And who is this email being sent to?

23 A David Underdown.

24 Q And where was he?

25 A He was the son of Neil Underdown at Hickory Springs.

1 Q Okay.

2 MR. STREETER: Let me just ask that that sentence  
3 right there be highlighted.

4 Q First of all, subject line: "Summary of offer and  
5 commitment for 2002/2003."

6 What's going on here? What was the background? What  
7 are you negotiating here?

8 A 2002 -- 2001, 2002 were weak months -- or years for us.  
9 2001 was a very weak year. 2002 was also a weak year. So  
10 we're trying to increase our volume moving our polyols and  
11 products in those market segments.

12 Q But more basic question. What are you negotiating Hickory  
13 Springs here? What --

14 A Sell them flexible slab polyols.

15 Q Is this a contract? Is this a spot buy? What is it?

16 A Oh, no. It would be a commitment to buy so much product  
17 during a period of time, a year usually.

18 Q And what does this mean: "Dow will issue a signing bonus  
19 in the form of a credit memo of \$200,000 in December of 2002."  
20 What does that mean?

21 A Well, wrapping up 2002 we would issue them a credit memo of  
22 \$200,000 to pay for the product they bought so they wouldn't  
23 have to send the cash check to us. We'd give them a credit  
24 memo of \$200,000 to apply against the invoices.

25 Q And then in the next --

1 MR. STREETER: If you highlight the next paragraph.

2 Q "Effective October 1, 2002, the selling price for  
3 conventional polyols will be \$.56 a pound in rail cars with 1  
4 percent, 30 net, 31 day terms. (Note: Selling price can  
5 change based on flexible slab market.) Dow agrees to a  
6 'meet-or-release' competitive price clause."

7 It says: "Note: Selling price could change based on  
8 the flexible slab market. Dow agrees to a 'meet-or-release'  
9 competitive price clause."

10 What does a meet or release competitive price clause  
11 mean.

12 A Usually in the agreement you have a clause in there that  
13 the customer can give you a price increase; here's the new  
14 price or here's the lower price. Okay? So they give you a  
15 lower price. We can either meet that price or we can say we're  
16 not going to meet the price and we'll release from you the  
17 obligation of the contract.

18 Q When you say "the customer would give you another price,"  
19 what do you mean by that?

20 A Would give you documentation: Here's really what our price  
21 is. Will you meet this price?

22 Q Price from whom or where?

23 A One of our key competitors, okay?

24 We looked at the key competitor factor not somebody  
25 brought in from overseas or something like that.

1 Q Did this contract obligate them to buy a certain amount  
2 from you?

3 A I didn't read through the whole contract, I don't have it.  
4 But typically all the contracts, you had a position that they  
5 agreed to buy so many millions of pounds in that time period  
6 and that's where you base --

7 Q And -- I'm sorry.

8 A -- credit, \$200,000, so there would be a credit, here's  
9 where you're going to buy in that particular time, boom.

10 Q And the meet-or-release, what are you saying there? We'll  
11 do what?

12 A Basically what we're saying, we either meet the agreement  
13 with you, or if we don't, then you're released from the  
14 contract commitment for buying the volume.

15 Q When you say "meet the agreement with you," what do you  
16 mean by that?

17 A I'm saying, meet really what the price offer is from the  
18 competition.

19 Q And then the next sentence: In April 2003 --

20 MR. STREETER: If you blow up that.

21 Q (Reading) In April 2003 -- so now this is the next year.  
22 Right?

23 A Yes.

24 Q -- Dow will issue a second signing bonus equal to the  
25 selling bonus -- selling price minus \$.50 a pound for

1 conventional polyol business -- or -- purchases from October 1,  
2 2002 through March 31, 2003.

3 Do you see that?

4 A Yes.

5 Q So what does that mean? Well, the big picture: What does  
6 a signing bonus mean?

7 A Usually what the signing bonus was set up that you sign  
8 this contract, you commit to buy this many millions of pounds,  
9 we'll give you a signing bonus that you agree to the contract  
10 and we'll give you the signing bonus up front.

11 Q I want you to turn to the relationship with Woodbridge.

12 Can you describe just a big picture of what your  
13 relationship was with Woodbridge in the 1994 to 2003 time  
14 period?

15 A Woodbridge was located up in Toronto, Canada, and  
16 stipulations of how we had to work, even though I was director  
17 of sales for North America, when you're dealing with somebody  
18 in Canada you had to work with Canadian sales organization to  
19 make the calls, work on the contracts and make the agreement  
20 with the customer.

21 So I would call on Woodbridge with our sales  
22 organization based in Toronto to call on Woodbridge, looking at  
23 supplying them the price they need for the flexible molded  
24 market and their applications going into automotive seating and  
25 so forth.

1 Q During the period of time, 1994 to 2003, did you -- how  
2 often did you supply to Woodbridge?

3 A I thought that we had a strong position with Woodbridge  
4 over most those years but I know there were times that there  
5 was a falling off on the volume and so forth. Part of it  
6 depending on what's happening in the automotive company, but  
7 part of it could have certain agreements with the other  
8 suppliers to supply them differently. They bought from more  
9 than one supplier.

10 Q And when you say, "agreements with the other suppliers,"  
11 who -- their agreements with the other suppliers?

12 A Their agreement with other suppliers might require them to  
13 buy certain volumes from the other competitors in a certain  
14 time period in order to meet a goal if they had an agreement,  
15 contract agreement with those guys.

16 Q Let me ask you to put up DX-5758.

17 This is an email from Joanne Hughes to Dave Fowler.

18 A Okay.

19 Q Do you know who Dave Fowler was?

20 A He would have been based really in Canada I think. Okay?

21 Q And what company did he work for?

22 Move the microphone closer to your mouth.

23 A Oh, I'm sorry.

24 Well, I assumed he worked for Dow up in Toronto, yeah.

25 Q And Joanne Hughes, who did she work for?



1 A Woodbridge.

2 Q And then --

3 A I'm really more just familiar with Bruce O'Brien though  
4 with Woodbridge. I didn't know her.

5 Q Bruce was the person you dealt with?

6 A One of the persons up there we dealt with, yes.

7 Q And I want to look at this first paragraph here.

8 MR. STREETER: If we can highlight that whole thing.

9 Q (Reading) Rick Beitel has confirmed that Dow will allow the  
10 purchaser -- meaning Woodbridge, right?

11 A Right

12 Q -- (Reading continues) -- to continue to pay the net net  
13 pricing contained in the Supply Agreement understanding that  
14 current purchases annualized will not meet the agreed to  
15 minimum annual volume of 127.5 million pounds.

16 Do you see that?

17 A Yes.

18 Q So what's going on here?

19 A Well, looking at July 2002, it looks like overall their  
20 market was weak and they couldn't exactly live up to the total  
21 commitment of that many millions of pounds going into their  
22 product mix. So if they had a net net price, typically we  
23 agreed to a net net price would have been the regular price  
24 with the discount already included into it for that period of  
25 time. So they were paying a net net price rather than the

1 price with a discount.

2 So what we're saying, we'll agree to the net net price  
3 even though they're not going to reach the agreed to volume.

4 Q Why would you do that with a customer?

5 A Well, typically sometimes the market conditions changed.  
6 It could have been differences in what's going into the bedding  
7 market. This was the automotive market. Was automotive being  
8 very strong and they were supplying a lot of automotive parts;  
9 or was the automotive market sales down, so they weren't able  
10 to supply enough of the foam.

11 Q Why would you agree with them? You had a contract that  
12 said they had to met certain volume and you're essentially  
13 letting them off the hook with that. Right?

14 A Correct.

15 Q Why would you do that?

16 A Well, typically, when you have something like that, then  
17 you'd increase the number of moving out expanding the years of  
18 your contract. We'll agree to this if you agree to doing  
19 something, expanding the contract, rather than end it, say, in  
20 2002, expand it to 2003.

21 Q Although here you're not doing that, you're just saying you  
22 don't have to meet it, right?

23 MR. JOHNSON: Objection. Leading.

24 THE COURT: It is leading.

25 Q Is there anything in here about how they have to sign the

1 next contract?

2 A No.

3 Q So why would you -- why would you release them if they  
4 hadn't signed another contract yet?

5 MR. JOHNSON: Objection. Asked and answered.

6 THE COURT: No, I'll allow it.

7 Go ahead.

8 A To me this looks like a short documentation from Bruce  
9 O'Brien to other Dow people. The real negotiation would have  
10 been a lot longer and more thing than this short little note  
11 about what's going on.

12 Q I'm going to ask -- I'm going to ask you to take a look at  
13 a document, Defense Exhibit 1059.

14 MR. STREETER: You could blow up this portion of the  
15 document right here.

16 Q Is that you right there?

17 A Yeah. Yes, I see it now. Yes.

18 Q And who is James Mason.

19 A He was sort of in the business working at Dow.

20 Q And the date is -- is that December 10th, 1997?

21 A Yes.

22 Q And what is Huber? Did you do much business with Huber?

23 A I didn't have much interface with Huber, no.

24 Q Did Dow do much business with Huber at all?

25 A To me it looks like it was with a different group in the

1 Dow organization than I was. It could always have been in the  
2 Systems business or something, I'm not sure.

3 Q Let me ask you to look at this first sentence.

4 MR. STREETER: If we would blow that up.

5 Q (Reading) Huber has decided to go with ICI for all four  
6 plants with a three-year contract, so we are back to where we  
7 were with Huber a month and a half ago.

8 What does that mean?

9 A It looks like James and them were looking at trying to get  
10 Huber as a customer of theirs and try to put together a  
11 program, and it looks like it failed.

12 Q And the last sentence: "We have no way of knowing" --

13 MR. STREETER: Could you blow that up or highlight  
14 that.

15 Q "We have no way of knowing how much Huber shared or didn't  
16 share with ICI regarding our offer."

17 Do you see that?

18 A Yes.

19 Q Would you -- would you -- would you typically learn from  
20 your customer what the competitors were offering to them?

21 A Key customers, large customers, yes, we would.

22 Q How about a situation like this where it wasn't -- it  
23 wasn't a regular customer?

24 A Customers fairly small in the business I'm not familiar  
25 with, so...

1           It looks like the relationship wasn't very strong  
2       there. I don't -- I don't know them.

3           MR. STREETER: Highlight that next sentence, "ICI has  
4       made it pretty plain."

5       Q     (Reading) ICI has made it pretty plain that they are going  
6       to play "hardball" at every account and they are fully intent  
7       on keeping Dow completely out of, quote, their market.

8           What do you understand the "hardball" to refer to?

9           MR. JOHNSON: Your Honor, objection. He's already  
10      indicated that this is not even his area, he doesn't know this  
11      client, and now we're just eliciting what he thinks it means  
12      and what words say. He doesn't have any familiarity with this  
13      situation.

14          MR. STREETER: He's cc'd on the document, your Honor.

15          THE COURT: That's all right. I'll sustain the  
16      objection.

17      BY MR. STREETER:

18      Q     Do you know whether you got much business from Huber?

19      A     No, I don't.

20      Q     I want to turn to Leggett & Platt.

21            You mentioned before -- can you describe kind of the  
22      business relationship with Leggett & Platt? How much business  
23      did you do with them over the '94 to 2003 time period?

24      A     We were their major supplier over that period of time and  
25      we had developed a really strong relationship with Leggett &

1 Platt both with their corporate headquarters and also with  
2 Larry Heppe and Joe York down in Fort Worth, Texas. They were  
3 one of our major flexible slab accounts in that industry. They  
4 were also very financially strong, which made it easier to work  
5 for the customer that you knew had financial strength, was  
6 willing to pay the bills and pay them.

7 Q Let me ask you to turn to Defense Exhibit 1228.

8 This is dated January 2nd, 1997. And it says:

9 "Dear Larry" -- who was Larry Heppe?

10 A Larry Heppe developed -- overall became really the  
11 president of the Leggett & Platt Foam Group down there.

12 Q And it says: (Reading) Dear Larry: Attached is the  
13 proposal for a three-year contract between Leggett & Platt and  
14 the Dow Chemical Company. The three-year commitment  
15 incorporates a 75 percent supply position for conventional  
16 polyether polyol and other products.

17 So what is this? Is this -- what -- what's going on  
18 here?

19 A Well, going back to that period, this is looking at it,  
20 signing a contract so we know how much volume we were going to  
21 be supplying to the different plants that Leggett & Platt had.

22 MR. STREETER: And if we can highlight that up there.

23 Q What year is this going to cover?

24 A That looks like it's going to be '97, '98, '99. So  
25 typically it was a three-year contract that we had put together

1 with them.

2 MR. STREETER: And if we can turn to page 5 of the  
3 document.

4 If you could highlight this right here: Also that  
5 part there.

6 Q So it says, "Leggett & Platt Urethane. Dow Contract,  
7 January '97 to December '99. Summary of Free Material."

8 And then it has a bunch of different things: Signing  
9 Bonus; Volume Commitment; Terms Adjustment; Developmental  
10 Allowance. It's has a bunch of dollar amounts, and it has this  
11 dollar amount right here: \$1,593,000.

12 What is that? What is that number?

13 A Well, that number would be the market price for the polyols  
14 and the TDI that we would be selling to them.

15 Q Summary of Free Material.

16 What is this page here about?

17 A In reality, when we have signing bonus, TDI, what you would  
18 do is give them free goods rather than actual selling them the  
19 tank car of TDI or the polyol. So you'd give them free goods  
20 over that time period of three years.

21 Q Why would you do that? Why would you give them free goods,  
22 what was your purpose in doing that?

23 A Well, the free goods, of course, was -- we had a margin on  
24 the free goods. I mean, so we had a profit on the free goods.  
25 So if you give them free goods you'd know they wouldn't use our

1 products in those applications and it wouldn't be the net price  
2 or the true price that was listed on invoice. It wouldn't be  
3 as high as that because there is a margin in that product that  
4 would be retained. And typically you use the free goods  
5 because you use the free goods, you had to use this much  
6 volume, buy it from us and we'll give you the free goods type  
7 of thing.

8 Q It was a way of getting more volume?

9 A Keeping the volume and using our products. And they had to  
10 use the material, buy the material then you give them the free  
11 goods basically as the signing bonus or their bonus for buying  
12 that much material from you.

13 Q Turning to Defense Exhibit 1227, is this a similar document  
14 for the years '94 to '96?

15 MR. STREETER: Can you highlight that first sentence.

16 Q What is this?

17 A "As per our discussion" -- looks like the sales -- with  
18 Leggett & Platt you always had a sales contract for over those  
19 period of times because they would commit to buying so much  
20 material from you.

21 Q And this is the '94 to '96 period?

22 A Yes.

23 Q And I'll ask you to turn to the fourth page of the  
24 document: Look at the bottom.

25 MR. STREETER: Highlight the bottom.



1 Q We've got prices here first. Can you describe a little bit  
2 about the negotiation process to get to the prices?

3 A Well, we looked a little bit at what their volume was,  
4 where their plant locations were and what the competitive  
5 situation was with Leggett & Platt.

6 Q When you say the "competitive situation," what do you mean?

7 A Well, they'd give us a little bit what their competitive  
8 prices was, what they would be paying other people for those  
9 products.

10 Q When you say they'd give you information about their  
11 competitive situation --

12 A They'd give us information about what they're paying for  
13 products from other people, other suppliers.

14 Q Got it.

15 And then what would happen?

16 A Well, they were such a large customer of ours, as you can  
17 see we had almost 75 percent of the requirements, and we had  
18 grown with them helping them with research projects and  
19 everything else, so it was a good fit company that we worked  
20 with, so --

21 Q So what would you do in response to them telling you,  
22 here's what the competitor's doing? What would you do in  
23 response to that?

24 A We'd look at the competitive, and if we worked out the  
25 details, we'd meet the competitor's situation.

1 Q When you say "meet the competitive situation," what do you  
2 mean?

3 A Well, they would have to supply us, and typically you might  
4 send them a letter: Here what's their price is and they would  
5 have to say, here's what we're paying your competitors, will  
6 you meet that price?

7 Q Got it.

8 MR. STREETER: And "Incentive Program" at the bottom  
9 of the page, if you could blow that up.

10 The whole thing. Blow it up. I mean highlight it. I  
11 apologize.

12 Q It says: (Reading) To qualify for quarterly incentive,  
13 customer must purchase at least 75 percent of its quarterly  
14 requirements from Dow. During the contract period, should  
15 customer purchase products equal or exceed the aforementioned  
16 percentage for the products in calendar quarter, Dow agrees to  
17 issue customer a 2 percent incentive credit based on the price  
18 of the products purchased in said quarter. The incentive  
19 credit should be in the form of customer credit to be supplied  
20 toward the purchase of additional products.

21 Do you see that?

22 A Yes.

23 Q So what does that mean?

24 A Well, instead of giving them cash for buying something, we  
25 gave them a credit for buying material, living up to the

1 contract, and then that credit could be used to buy -- to pay  
2 off an invoice and so forth. So it was a credit against the  
3 invoice, not actually money going out to them. So you had to  
4 buy -- they got a 2 percent credit and they could apply that to  
5 the invoices due.

6 Q Let me ask you the turn to DX-1191.

7 The jury has seen this document before. I just want  
8 to ask you a few questions about it. So first of all, it's  
9 from -- who is that from?

10 A Joe York reported to -- actually he was more of a personal  
11 guy reporting to Larry Heppe.

12 MR. STREETER: Josh, if you could just highlight the  
13 bottom. Undue that and highlight the bottom.

14 Q And then who is it to?

15 A Larry Heppe was sort of the president of the Leggett &  
16 Platt Foam Division.

17 Q Okay. And you described before the kind of relationship  
18 you had with him.

19 MR. STREETER: If you could highlight that paragraph  
20 right there.

21 Q (Reading) Rick, someone must be signing your name to  
22 increase letters without your knowledge again. I received one  
23 this afternoon and promptly sent it to the circle file. You  
24 should check out who is sending this BS and terminate them  
25 immediately - before someone reminds us of announced recent

1 price increases that deteriorate below the existing price.

2 First of all, what did you understand the circle file  
3 to mean?

4 A Garbage can.

5 Q And when he says: "...before someone reminds us of  
6 announced recent price increases that deteriorate below the  
7 existing price," what did you understand that to mean?

8 A To me it looks like he was getting a lower price than he  
9 was currently paying from a competitor.

10 Q And when it says: "...announced recent price increases  
11 that deteriorate below the existing price," what's he saying  
12 about what might happen to the price they're paying if you  
13 insist on an increase?

14 MR. JOHNSON: Objection. Asked and answered.

15 THE COURT: I don't think so. I'll allow it.

16 Go ahead.

17 MR. STREETER: Can you could read back the question.

18 (The record is read.)

19 MR. STREETER: Let me try --

20 Q When he says, "...announced recent price increases that  
21 deteriorate below the existing price," what did you understand  
22 that to mean about what might happen to the price if you  
23 insisted on an increase?

24 A Well, his terminology was, if we increased, the price would  
25 fall even further down do what product was currently being sold

1 to him for.

2 Q Then I want to look at the top of this here.

3 It says --

4 MR. STREETER: If we can high height this portion of  
5 the document.

6 Q Joe York; who is he?

7 A He was actually doing most of the actual purchasing of the  
8 products for Larry Heppe and Leggett & Platt.

9 Q He worked at Leggett & Platt?

10 A He worked in the same office in Fort Worth as Larry.

11 Q And he's sending an email to Larry Heppe?

12 A Right.

13 MR. STREETER: And then if we could blow up that  
14 paragraph right here.

15 Q (Reading) Larry, along this line, I spoke with BASF today  
16 and told them we would not accept the price increases before  
17 April 1st, 2004. Any increase at that time would depend on  
18 business conditions. I told David if a supplier was not  
19 willing to work with us in this regard we would move the  
20 business elsewhere.

21 What do you understand that to mean?

22 MR. JOHNSON: Objection. That's not to him. Is he  
23 interpreting somebody else's words here? The document speaks  
24 for itself.

25 THE COURT: Yeah. Sustained.

1 Q Did you ever have a customer come to you and say: "If you  
2 insist on this price, we're going to move somewhere else?"

3 A Yes.

4 Q The last document, Defense Exhibit 1225.

5 THE COURT: Mr. Streeter, I just want to get an idea.  
6 How much longer?

7 MR. STREETER: This is it.

8 THE COURT: This is it? Okay.

9 MR. STREETER: Yeah.

10 Could you blow up the top -- actually if you could go  
11 to the last page of it first. Sorry. The second to last page.

12 Q Is that your signature right there?

13 A Yes.

14 Q And this is Larry Heppe?

15 A Yes.

16 Q And then if we go back to the front page.

17 Was there a time when you had a problem with a product  
18 that you sold to Leggett & Platt, an odor problem?

19 A Yes.

20 Q And did you ultimately settle that dispute with them?

21 A Yes.

22 Q And is this the settlement agreement?

23 A Didn't read through it all, but we did have an odor problem  
24 and we did make a settlement because it impacted their  
25 products.

1 Q And this -- let me just go to the second to last page.

2 MR. JOHNSON: Your Honor, I'm going to object to this  
3 examination. At best this is a legal issue, not one for the  
4 jury. Perhaps we need a sidebar.

5 MR. STREETER: Two things, your Honor. It's  
6 pre-admitted; and my last question is, I just offer it and then  
7 I'm done.

8 MR. JOHNSON: It's not pre-admitted, your Honor.

9 THE COURT: All right. If that's it, then subject to  
10 that issue we'll take a recess. Okay.

11 MR. STREETER: Okay.

12 THE COURT: Ladies and gentlemen, we'll recess for 15  
13 minutes to 10:30. We'll see you back at 10:30.

14 Thank you very much.

15 THE DEPUTY CLERK: Please rise for the Jury.

16 (The Jury leaves the courtroom.)

17 THE COURT: Mr. Beitel, stay here a minute.

18 THE WITNESS: I'm sorry.

19 THE COURT: All right. You can step down now

20 Well, let's see.

21 What is the objection now?

22 MR. STREETER: We just want to put the document into  
23 evidence. We're not going to ask him any questions about it.  
24 There is a legal issue, but I need to get it into the record  
25 and that's all I'm doing.

1 THE COURT: Well, is it pre-admitted, number one?

2 MR. JOHNSON: It is not, your Honor. We had an  
3 objection to the document.

4 THE COURT: All right. So you have an objection.

5 MR. JOHNSON: It is a legal issue.

6 MR. STREETER: We had it --

7 THE COURT: Wait, don't interrupt, please. Let's do  
8 one at a time.

9 MR. JOHNSON: This was an odor problem -- you've heard  
10 about that in other testimony -- that Dow had with their TDI  
11 for a time period, and there was a settlement between these  
12 parties with respect to that issue. And there was a general  
13 release. And they're trying to claim that somehow that release  
14 is the antitrust claims. There's a lot of law on that that you  
15 can't release antitrust claims unless it's absolutely  
16 specifically to the antitrust claims. That's the legal issue.

17 They can make that argument in a motion, it doesn't  
18 need to be a part of the record.

19 THE COURT: In a motion? Okay.

20 MR. STREETER: I just want to clarify something. Do  
21 we have your agreement that with respect to our Rule 50 motions  
22 we don't need to put the documents connected to them on these  
23 legal issues into evidence.

24 MR. JOHNSON: No, on this issue.

25 MR. STREETER: On this issue.



1 MR. JOHNSON: This issue alone, yes.

2 MR. STREETER: Okay. How about the Burtin, Skypark  
3 assignment issue?

4 MR. JOHNSON: No, you're going to have to put that  
5 evidence in. That goes to something.

6 THE COURT: Can I see the document during the recess,  
7 please?

8 MR. STREETER: Sure.

9 THE COURT: All right. Then we'll break until 10:30.

10 MR. JOHNSON: Your Honor, would you remind the witness  
11 that he's not to speak to anyone about his testimony?

12 THE COURT: Yeah. I think the attorneys understand  
13 that.

14 During your examination, you're not to confer with the  
15 attorneys about your testimony. Okay?

16 THE WITNESS: Okay.

17 THE COURT: Thank you.

18 (Witness temporarily excused.)

19 THE COURT: We'll come back and you'll be ready for  
20 cross-examination. Right, Mr. Johnson?

21 MR. JOHNSON: Yes, indeed.

22 THE COURT: Okay.

23 MR. STREETER: After the witness leaves I think it  
24 might make sense for us --

25 THE COURT: Go ahead.

1           MR. STREETER: We're going to want to write to your  
2 Honor about this issue --

3           THE COURT: Pull the microphone closer.

4           MR. STREETER: On this issue of -- it's a totally  
5 separate issue but it just came up here, and this is the  
6 question: There are some questions in this case about whether  
7 or not the parties who are suing have the claims, whether or  
8 not they can bring the claims. They're all legal issues.  
9 They're all about contracts, they're all about assignments,  
10 they're all about those kinds of things. And we're going to  
11 write to your Honor about the question whether we need to put  
12 that evidence in front of the jury or whether that's just a  
13 question for you to resolve whether or not some claim was or  
14 was not assigned and whether or not someone owns a claim. And  
15 I don't think it makes any sense for us to be putting in front  
16 of the jury contracts and assignments that they can't possible  
17 interpret.

18           So we're going to write to you about this but I just  
19 wanted to put that out there to give --

20           THE COURT: Before you start writing to me --

21           MR. STREETER: Right.

22           THE COURT: -- I want to know why wasn't this issue  
23 previously addressed to the Court?

24           I must have received 14 motions in limine or more from  
25 both sides. This sounds like an issue that should have been

1 addressed in motions in limine.

2 MR. STREETER: It's --

3 THE COURT: Don't interrupt me.

4 MR. STREETER: My apologies.

5 THE COURT: You always do that, Mr. Streeter. Okay?

6 I'm just raising one issue. You know, it sounds like  
7 a lot of -- a number of things that have come up here could  
8 have been anticipated by way of motions in limine that I  
9 addressed about, more than 14. Okay? And we didn't timely.

10 This sound like one that should have been addressed  
11 pretrial. That's the first thing. I don't know what it's  
12 about. Before you start sending in briefs, I'll hear more  
13 about it after the break or some time. Okay?

14 MR. STREETER: Just so your Honor understands, this is  
15 a Rule 50 motion. It's a directed verdict motion. It's not a  
16 question of a motion in limine, it's a directed verdict motion.

17 THE COURT: Yeah, but you're telling me it has to do  
18 with certain legal settlements and/or documents that -- I don't  
19 know whether they're going to be in evidence or not in evidence  
20 or not. So, you know, I'm hearing they're not pre-admitted,  
21 and so I'm hearing there's objections to these.

22 So it sounds like an issue that could have been  
23 raised, whether it's in part of the Rule 50 or not, earlier  
24 than today.

25 MR. STREETER: But, your Honor, part of it is

1 dependent upon what evidence they put in at trial. They have  
2 not put in any evidence to support these assignments at all,  
3 none. And we want to move for a directed verdict on their  
4 failure in that regard. That's the issue.

5 But, your Honor, I think it makes sense --

6 THE COURT: Well, you reserved on the directed  
7 verdict.

8 MR. LUSTBERG: Exactly. We haven't filed it, yes,  
9 correct, we haven't filed it.

10 THE COURT: Correct. Right?

11 MR. JOHNSON: Your Honor, the only thing I would say  
12 is that these issues could have and should have been raised in  
13 a matter of either summary judgment or motion in limine if they  
14 are truly just legal issues. And we certainly don't have an  
15 obligation to put in something unless there's a dispute. And  
16 so far I haven't seen any evidence that there's a dispute.

17 THE COURT: Now you're talking about a motion, you  
18 know, a directed verdict motion. I mean, now you're both  
19 talking about that. And I guess -- I don't know -- I guess I'm  
20 anticipating you're going to file a formal motion. Okay?

21 MR. LUSTBERG: That's correct, Judge. Just so it's  
22 clear, the rules require us, as I mentioned, that we file it  
23 before the jury retires and that's what we'll do.

24 THE COURT: Well, if you're going to file that motion,  
25 since you reserved on it you can file it at any time --

1 MR. LUSTBERG: Correct.

2 THE COURT: -- to give me the benefit of having it and  
3 giving them the benefit of seeing what it is you're saying.  
4 Don't drop it on my desk the day we're going to charge the  
5 jury.

6 MR. LUSTBERG: Of course.

7 THE COURT: Although I can reserve on it.

8 MR. BERNICK: We will be getting those motion to  
9 you --

10 THE COURT: I can reserve on that too, which I  
11 probably will based on the fact that I hear you're going to be  
12 submitting a lengthy, probably a lengthy motion. We'll see.

13 MR. BERNICK: No, I'm not -- I didn't mean to give you  
14 an expression --

15 THE COURT: I am just trying to say, timing means  
16 something.

17 MR. BERNICK: I understand.

18 THE COURT: Okay? We're getting I think close to the  
19 end. I promised this jury we would have it in their hands  
20 within six weeks.

21 MR. BERNICK: We will certainly, we will certainly do  
22 that, your Honor. We know that these things are still coming  
23 at you, and I know that we have -- we were -- we weren't ready  
24 for the date that you gave us. There's just no question about  
25 it, and we've missed things, we understand that.

1           THE COURT: Well, I'm a little shocked, to be very  
2       frank with you, and I think you know my annoyance about that,  
3       this case has been out there for 10 years you've been working  
4       on this -- well, you've been working on this -- when was the  
5       Complaint filed?

6           MR. JOHNSON: 2008.

7           THE COURT: Yeah. So you've been working on this  
8       seven years. Okay? You've been doing your depositions. And  
9       then it sat around.

10          MR. BERNICK: Yes.

11          THE COURT: And it sat around because nobody really --  
12       you know -- okay?

13          MR. BERNICK: That's true.

14          THE COURT: I didn't have it that long, another judge  
15       did, and it sat there.

16          MR. BERNICK: Yes.

17          THE COURT: I don't mean to be critical but I can  
18       understand why because nobody really -- okay.

19          MR. BERNICK: Right.

20          THE COURT: Okay. Well, back in June when I said you  
21       had a pretrial trial conference with Judge Falk. I initiated  
22       that with Judge Falk --

23          MR. BERNICK: Right.

24          THE COURT: -- and nothing happened.

25          MR. BERNICK: Well --

1           THE COURT: Very little happened. That pretrial  
2 conference, that Final Pretrial Order is an embarrassment to  
3 both of you.

4           MR. BERNICK: All I'll saying, your Honor, the reason  
5 I raise an old -- not an old issue -- but obviously a  
6 troublesome issue from our point of view is that really in a  
7 little bit of fairness, the record in this case and the number  
8 of documents is mind-boggling. And both sides I think failed  
9 to -- failed to timely do work for the reasons that you've  
10 indicated. But from June going forward there's a tremendous  
11 amount of work that got done, and you can just see that there  
12 are thousands and thousands of documents, all kinds of  
13 testimony. And as much as we dedicated ourselves to being  
14 ready on time, there are some issues that carry forward. And  
15 we understand that, we understand this is an imposition on the  
16 Court.

17           THE COURT: It's clear that that's the case.

18           MR. BERNICK: Yes.

19           THE COURT: That's the case.

20           MR. BERNICK: But we're trying to do our best to only  
21 focus on the ones that really, really make a difference.

22           THE COURT: I'm not prejudging, I'm just saying, I'm  
23 trying to give you an idea, you know, there's a time factor  
24 coming up in the next few weeks.

25           MR. BERNICK: Yes.

1           THE COURT: You know, there's one juror that has a  
2 problem, Juror No. 2.

3           MR. BERNICK: We are going to be -- to set your mind  
4 at ease a little bit perhaps, your Honor, I believe that we're  
5 going to be done, done this coming Thursday, maybe even --  
6 maybe even before the end of the day.

7           THE COURT: Are you having any rebuttal?

8           MR. JOHNSON: There may be some. It depends primarily  
9 on Dr. Ugone and some of those types of issues.

10          THE COURT: All right.

11          MR. BERNICK: So we're really very close. And the  
12 number of issues --

13          THE COURT: I know you are because I've been keeping  
14 track and I know exactly where we are. Okay? I'm not being  
15 overly -- I'm just saying, when I hear there's issues that were  
16 not resolved and that there appears to be some significant  
17 dispute, just let me know about them quicker than this is  
18 happening.

19          MR. BERNICK: I know we have a letter to your Honor,  
20 they have a letter to your Honor. I think that's probably one  
21 of the last evidentiary matters that --

22          THE COURT: You're talking about Barbour?

23          MR. BERNICK: The Barbour thing, yes.

24          THE COURT: I'll deal with that. I'll deal with that  
25 when we come back, or this morning some time.



1 MR. BERNICK: Thank you.

2 THE COURT: Fifteen minutes. Okay? Twenty of.

3 (A recess is taken.)

4

5 R I C H A R D L. B E I T E L, resumes, testifies further as  
6 follows.

7

8 (Proceedings resume - Jury not present.)

9 THE DEPUTY CLERK: Remain seated.

10 THE COURT: Let's get started.

11 Please, bring out the jury.

12 THE DEPUTY CLERK: All rise for the Jury, please.

13 (Jury present.)

14 THE COURT: You can be seated, thank you.

15 All right. Mr. Johnson, cross-examination.

16 MR. JOHNSON: Thank you very much, your Honor.

17 Good morning, all. Nice to see you again.

18 CROSS-EXAMINATION

19 BY MR. JOHNSON:

20 Q Mr. Beitel, good morning.

21 A Good morning.

22 Q My name is Jeff Johnson. We've not met before. Correct?

23 A Correct.

24 Q Do you recall that you gave sworn testimony in this case  
25 twice: Once in December 2009 and then again in February of

1 2013?

2 A In those cases, yes.

3 Q And each time you met beforehand with Dow's counsel and you  
4 reviewed pertinent documents. Right?

5 A I recall that, yes.

6 Q And before you came here today you sat down with Dow's  
7 counsel and reviewed pertinent documents. Right?

8 A Reviewed documents, yes.

9 Q We've placed those transcripts from your prior testimony to  
10 your left there on the witness stand in case you need that to  
11 refresh your recollection. Okay?

12 A Okay. I didn't bring my reading glasses.

13 Q We'll find a pair for you. I have two, plus. Would that  
14 work for you?

15 A We'll see.

16 Q Okay. Very good.

17 Most of these will come right up on the screen so you  
18 may not even need to look at that.

19 A Okay.

20 Q So in your direct examination by Mr. Streeter, you  
21 mentioned that oftentimes with these bigger customers you would  
22 use free goods as a method of inducing them to give you larger  
23 volumes. Is that about right?

24 A We used free goods with some of the accounts, yes.

25 Q Yeah. And one of the advantages of using free goods is

1 that you had a profit margin built in there, so it really cost  
2 you less because of the profit that you would have on the  
3 product anyway. Right?

4 A Most of them were delivered after they lived up to their  
5 contract.

6 Q Right. But the fact of the matter of giving free goods, if  
7 you're selling at \$.70 a pound, that's not Dow's cost. Dow's  
8 cost might only be \$.50 a pound and therefore it was cheaper  
9 for Dow to give incentives in that fashion. Right?

10 A It worked out well for the customer too.

11 Q Sure, of course.

12 Now, you mentioned that these kind of things did not  
13 go to most customers. Right?

14 A Correct.

15 Q This was only for those big customers with big volumes. It  
16 was all about volumes. Right?

17 A And the product line.

18 Q So you also talked a little bit in your examination about  
19 the price increase letters. And when they would go out  
20 market-wide, let's say hypothetically, it went out market-wide,  
21 it wasn't just a segment. Okay? And so a price increase  
22 announcement goes out market-wide. The start of negotiations  
23 for all these customers would be whatever that price was, that  
24 price increase announcement. Say you were going up \$.06. The  
25 start of negotiations would be at that level. Correct?

1 A Correct, but we didn't always send it to the whole  
2 polyurethane market.

3 Q I understand. I'm just saying hypothetically if it went  
4 out to the entire market, negotiations for all customers would  
5 start at the same place. Right?

6 A Correct.

7 Q Let me talk a little bit about your responsibilities and  
8 your reporting relationships.

9 As I understand it, you were the Sales and Marketing  
10 Director for Dow's urethane business in North America from 12/  
11 1995 into mid-2000. Correct?

12 A 2003.

13 Q It was only to mid-2000 that you were the sales --

14 A Okay.

15 Q -- and marketing director for Dow's urethane business.  
16 Correct?

17 A Then I became the Commercial Director which I had the sales  
18 responsibility.

19 Q We haven't gotten there yet.

20 A Okay.

21 Q So we've got the first part. Right?

22 From 12/1995 into mid-2000, you were the Sales and  
23 Marketing Director for Dow's urethane business in North  
24 America?

25 A Just the Director of Sales.

1 Q Okay. And then you became the Commercial Director for  
2 urethanes for North America from mid-2000 to 2004. Correct?

3 A Till June 2004, correct.

4 Q And you actually replaced Mr. Charles Churet as the  
5 Commercial Director for North America. Correct?

6 A I didn't think I replaced him.

7 Q Okay.

8 A Do you have a chart?

9 Q Let's try --

10 A I thought it was David Fischer that replaced him.

11 Q Okay. Let's try an exhibit.

12 MR. JOHNSON: Could we bring up PX-524, please.

13 Q I'll hand you a paper copy in case you need it, but it's on  
14 the screen there. You may find that easier to work with.

15 So in the beginning there, if you -- this is an  
16 organizational chart for Dow during the relevant period  
17 involved in this lawsuit. If you look about three quarters of  
18 the way down there you'll see Sales and Marketing Director  
19 North America, your name, 12/95 to 8/2000. Do you see that,  
20 sir?

21 A Yes.

22 Q And that's accurate. Right, sir?

23 A I thought I was only the Director of Sales during that  
24 period of time.

25 Q Well, this has been verified by corporate witnesses for

1 Dow. But whatever your recollection is, you were at least  
2 Sales Director of North America, right, for that period of  
3 time?

4 A Yes.

5 Q All right. And you'll see that Commercial Director North  
6 America a couple of steps above that included Mr. Charles  
7 Churet from 1/1/98 to 7/1/2000. Correct? You see that, sir?

8 A Yes.

9 Q All right. So if we go to the next page and look about a  
10 quarter of the way down there, you'll see that you took over  
11 Mr. Churet's position as Commercial Director of North America  
12 7/2000 -- that's the same time that Mr. Churet left that  
13 position --

14 A Okay.

15 Q -- to 7/04. Correct? You see that, sir?

16 A I remember me being the Commercial Director in that period,  
17 yes.

18 Q Okay. And that was for North America, just like Mr. Churet  
19 was Commercial Director of North America prior to you.  
20 Correct?

21 A I guess, yes.

22 Q Now, Mr. Churet was based in Switzerland while he was the  
23 Commercial Director for North America. Correct?

24 A In Europe, yes.

25 Q Let's go to DX-1370.

1           Once again, it may be easier for you to look on the  
2 screen but I'll give you a paper copy in case you need it.

3           These are notes prepared by David Underdown. You  
4 spoke of Mr. Underdown in your direct examination. Right?

5       A    Yes, I knew David.

6       Q    And David was with Hickory Springs. Correct?

7       A    Correct.

8       Q    And he's the -- Hickory Springs is one of the plaintiffs in  
9 this case, and these are notes of Mr. Underdown's relating to  
10 phone calls and meetings and written communications he had with  
11 you over a number of years when you called on Hickory Springs  
12 as a customer of Dow's. Okay?

13           Now, Hickory Springs, as you mentioned, was a customer  
14 of Dow's. Correct?

15       A    Correct.

16       Q    And in your role as sales director, you would call on Mr.  
17 Underdown from time to time. Correct?

18       A    Hickory Springs, Underdown, yes.

19       Q    Okay. If you would turn to page 7 of DX-1370, 007, in this  
20 exhibit, you see about halfway down the page that Mr. Underdown  
21 reports that he had a phone call with you on May 5th, 2000 at  
22 8:35 a.m.

23       A    Okay.

24       Q    Do you see that, sir?

25       A    It's highlighted. I can read it, yes.

1 Q Good. Excellent.

2 In the last paragraph of that entry, Mr. Underdown  
3 wrote, quote: Major reorganization. Charles and Phillipe not  
4 involved in biz after May. Rick will have more say. Control  
5 moves back to U.S. Should be announced next Wednesday, closed  
6 quote.

7 Now, "Charles" is a reference to Charles Churet.  
8 Correct?

9 A Correct.

10 Q And this refers to the reorganization at Dow that led you  
11 to replacing Mr. Churet as Commercial Director in North  
12 America. Correct?

13 A I guess so, yes

14 Q And it was at this point in time that control of Dow's  
15 polyurethanes business moved back to the U.S. from Europe.  
16 Correct?

17 A No. The business was controlled by the business managers  
18 in North America --

19 THE COURT: Mr. Beitel, speak into the microphone,  
20 please.

21 THE WITNESS: I thought I was. Okay.

22 THE COURT: You can pull it closer to you.

23 THE WITNESS: Sorry.

24 MR. STREETER: The witness was in a middle of an  
25 answer. I would like him to finish the answer.



1 A Could you ask the question again, please?

2 Q Sure. It was at this point in time as reported in this  
3 telephone call from Mr. Underdown that control was moving back  
4 to the United States. Correct?

5 A The control of what was happening in the United States  
6 never left the United States.

7 Q Okay. So are you telling me that Mr. Underdown got it  
8 wrong here when he said: "Rick will have more say. Control  
9 moves back to U.S."?

10 A The control always moved up to Bob Wood in the U.S., that's  
11 where the top of the level was.

12 Q Isn't it a fact, sir, that prior to this reorganization,  
13 control was from Mr. Churet in Europe, sir?

14 A No, it was a team that controlled what was going on in the  
15 business.

16 Q Okay. We'll come back to that in a bit.

17 As the commercial director, you had responsibility for  
18 the sales and some responsibility for marketing of urethanes.  
19 Correct?

20 A Correct.

21 Q And the salespeople who reported to you were responsible  
22 for large customer accounts like Carpenter, Woodbridge, Vita,  
23 et cetera. Right?

24 A Not necessarily Vita because that was an account that was  
25 in Canada, so the sales organization had to report up to the

1 Canadian organization not to me in the U.S.

2 Q But certainly Carpenter and Woodbridge. Right?

3 A Carpenter and Woodbridge, Leggett & Platt, yes.

4 Q Woodbridge, for example, was one of Dow's largest counts?

5 A Well, Woodbridge still reported to Canada too.

6 Q You tried to develop strong person relationships with these  
7 customers. Correct?

8 A I was brought in by the people in Canada to meet with them  
9 because of me being so heavily involved in urethanes in the  
10 U.S., yes.

11 Q And you had, as you've testified on your direct, many  
12 personal interactions with your customers. I think there was  
13 one you even stayed at his house.

14 A More than one, yes.

15 Q Okay. Now, competitor interactions for you were a  
16 different thing. Right? You didn't have very many of those?

17 A Competitive interactions?

18 Q Correct.

19 A No.

20 Q I think that you testified that while you were the  
21 commercial director, you had a small number of communications  
22 with Mr. Bernstein of BASF because BASF purchased polyols from  
23 Dow. Correct?

24 A Correct.

25 Q In your words, these were infrequent communications.

1 Correct?

2 A Infrequent communications in regards to their business, but  
3 frequent communications with regard to him being the Chairman  
4 of the Steering Committee of the API where I was vice chairman.

5 Q I haven't gotten to the associations yet.

6 A Sorry.

7 Q I'm just talking about the business about them being a  
8 customer of Dow's at the time period. You characterized those  
9 communications as infrequent. Correct?

10 A Correct.

11 Q And you were not like some others in this case, you weren't  
12 responsible for co-producer arrangements like swaps, that kind  
13 of thing. Right?

14 A Correct.

15 Q Swaps were handled by employees who worked in the supply  
16 chain function. Right?

17 A Supply chain, but also with the business managers.

18 Q And the supply chain people were not a part of your sales  
19 group. Right?

20 A Correct.

21 Q So a competitor would have no reason to call you about a  
22 co-producer arrangement. Right?

23 A Correct.

24 Q And you mentioned in your last answer, which I said I would  
25 get to, that you had some contact with Dow's competitors in

1 connection with the Alliance for Polyurethanes Industry trade  
2 association. Right?

3 A Correct.

4 Q For example, Mr. Geaman of Huntsman --

5 MR. JOHNSON: You have him there?

6 Yeah, there he is.

7 Q -- he was on the board of the API when you were vice chair,  
8 chairman and chairman of the API. Correct?

9 A Yes, I recognize him and know the name.

10 Q And Mr. Geaman performed functions similar to yours at  
11 BASF. Correct -- rather, rather at Huntsman. Correct?

12 A Yeah, he was with Huntsman.

13 Q Yes. And he performed functions similar to yours. Right?

14 A Not exactly sure but I assume similar.

15 Q Well, let's take a look at your deposition, page 74, lines  
16 four through 8.

17 (Reading) QUESTION: As to Bayer, who did you look to  
18 as performing functions similar to yours?

19 ANSWER: Didn't know.

20 As to Huntsman?

21 ANSWER: Greg Banks or Greg Geaman.

22 Is that an answer you gave?

23 A Yes.

24 Q So you would agree that Mr. Geaman performed functions  
25 similar to yours at Huntsman. Correct?

1 A I assume that, yes.

2 Q But all of your communications, all of your communications  
3 with Mr. Geaman dealt with the API, nothing else. Right?

4 A Correct.

5 Q The same with Greg Banks of Huntsman; he also performed, as  
6 we just saw your answer before, functions similar to yours with  
7 respect to TDI. Correct?

8 A I assume. Not sure.

9 Q And the only communications you've had with Mr. Banks  
10 involved seeing him at Polyurethane Foam Association meetings,  
11 and I believe you testified once you were both guests of  
12 Flexible Foam at a convention in Las Vegas in 2002 or '3.  
13 Correct?

14 A I remember that, yes.

15 Q Now, from time to time you attended social outings with  
16 Dow's competitors, such as golf and dinners. Correct?

17 A The only one I played golf with would have been at BASF  
18 because we were supplying products down there in Michigan.

19 Q Yes. I think you played golf with Bill Bernstein of BASF  
20 on the Island Course in Wyandotte, Michigan. Right?

21 A Right.

22 Q Okay. And you also had dinners from time to time with  
23 these competitors in connection with association meetings and  
24 the like?

25 A When you had an association meeting like the API, you met

1 for a couple of days, so in between there was a dinner  
2 arrangement.

3 Q And over time you and Mr. Bernstein became friends.  
4 Correct?

5 A Correct.

6 Q Let's talk about reporting relationships now.

7 You reported to David Fischer. Correct?

8 A During that period of time.

9 Q Mr. Fischer was the vice-president in charge of  
10 polyurethanes. Correct?

11 A In that certain time period, yes.

12 Q And Mr. Fischer reported to Bob Wood who was the business  
13 group president. Right?

14 A Correct.

15 Q And during the time -- I think you mentioned this -- that  
16 during the time that you were the commercial director,  
17 Stephanie Barbour also reported to Mr. Fischer as the business  
18 director for MDI and ridged and CASE polyols. Right?

19 A Yes.

20 Q And Mr. Levi reported to Mr. Fischer as the business  
21 director for TDI and flexible polyols. Right?

22 A And flexible molded I think.

23 Q All right. Let's jump forward a moment to 2004.

24 In early 2004, a lot of people in the urethanes  
25 business at Dow were either fired or left. Correct?

1 A Correct.

2 Q I think you said that 12 of the 16 people within your group  
3 had been eliminated. Correct?

4 A I guess that's the number.

5 Q That sound about right to you?

6 A That sounds about right, yes.

7 Q And one of those people that was fired was David Fischer.  
8 Right?

9 A Correct.

10 Q At some point during this early 2004 period, did you become  
11 aware of an investigation within Dow into urethane antitrust  
12 issues?

13 A No.

14 Q Mr. Fischer testified that in connection with his  
15 termination --

16 MR. STREETER: Objection, your Honor. The witness --

17 THE COURT: Let me hear the question. Let me hear the  
18 question.

19 Q In connection with his termination in early 2004, that Dow  
20 HR informed him that he was being investigated for improper  
21 activities with competitors. The jury has heard this  
22 testimony. I'd like to show it to you now.

23 MR. STREETER: Objection, your Honor. The witness  
24 said he knew nothing about it.

25 THE COURT: Okay. You can ask him, without referring

1 to the testimony, you can ask him if he knew about that.

2 MR. STREETER: Your Honor, he already said he didn't  
3 know anything about it.

4 THE COURT: Well, if he wants to ask some other  
5 questions, go ahead.

6 BY MR. JOHNSON:

7 Q Sir, you were not aware that Mr. Fischer was under  
8 investigation at Dow for improper activities with competitors?  
9 Is that your testimony, sir?

10 A No, I was not aware of that.

11 Q Okay. Do you recall whether you, sir, were interviewed by  
12 anyone at HR or Legal about improper activities with  
13 competitors?

14 MR. STREETER: Objection.

15 THE COURT: I'll allow that. Overruled.

16 Q You may answer, sir.

17 A No, Legal didn't ask me those questions, no.

18 Q Now, you were terminated by Dow in June of 2004. Correct?

19 A Correct.

20 Q And by the time you were terminated in mid-2004, Mr. Wood,  
21 Mr. Fischer, Mr. Levi and Ms. Barbour had been removed from  
22 their positions in polyurethanes. Correct?

23 A I believe -- would you repeat the names again?

24 Q Sure: Mr. Wood, Mr. Fischer, Mr. Levi and Ms. Barbour.

25 A Bob Wood left in 2003.



1 Q Correct. But he was also gone by then too. Right?

2 A Yeah, he left in 2003, yes, he was gone.

3 Q And I believe you said actually at some point later you  
4 went back to work for him?

5 A Correct.

6 Q And for the first part of 2004, you were still around  
7 mainly in a transitioning role. Correct?

8 A Yes.

9 Q Let's go to those price increase announcements.

10 You were involved in decisions when to issue price  
11 increase announcements and by how much. Right?

12 A I was involved in the committee that discussed it, yes.

13 Q And, in fact, you signed most of the price increase  
14 announcement letters that Dow sent out to its customers.  
15 Correct?

16 A Correct.

17 Q Now, Mr. Fischer, your boss, was actively involved in  
18 pricing decisions on urethanes as well. Correct?

19 A It was a team effort where he was sometimes the lead with  
20 the product people and myself, yes.

21 Q Okay. Was he, in fact, actively involved in pricing  
22 decisions on urethanes as well?

23 A It was urethanes he was involved in, yes.

24 Q Actively involved. Right?

25 A Decisions on when to raise the price and what to be, yes.

1 Q And over the course of 1999 to 2003, you estimated that you  
2 were successful in achieving the full amount of the price  
3 increase announcements 40 to 50 percent of the time. Correct,  
4 sir?

5 A I was -- that was in the testimony, and I would have to say  
6 that that wasn't really that accurate, no.

7 Q Okay. Let's take a look at that testimony at page 3549 of  
8 the February 2013 testimony at 15 through 20:

9 (Reading) QUESTION: And over the course of 1999 to  
10 2003, how successful were you in achieving the full amount of  
11 the price increase announcements that you sent out?

12 ANSWER: I'm not exactly sure. 40 to 50 percent of  
13 the time.

14 You see that answer, sir?

15 A Yes. I'd have to say that that wasn't really accurate.  
16 Sorry.

17 Q At other times you were successful in achieving some  
18 portion of the price. Correct?

19 A Some portion. Sometimes we didn't receive any of it.

20 Q And sometimes you achieved a portion and sometimes you  
21 achieved it tall. Correct, sir?

22 A Sometimes all, sometimes a portion, sometimes none.

23 Q When you took over as commercial director in 2000, there  
24 was a lot of pressure to try to increase prices and increase  
25 margins. Correct?

1 A Correct.

2 Q Around 2000, 2001, there was a change in management and the  
3 pressure became very aggressive. Correct?

4 A 2001, 2002 were really poor profitability years, yes.

5 Q Could you answer my question, sir?

6 A Would you repeat it, please, then?

7 Q Sure. Around 2000, 2001, there was a change in management  
8 and the pressure became very aggressive. Correct?

9 A I thought Bob Wood was still there and so was David  
10 Fischer.

11 Q Let's take a look at your deposition.

12 Page 132, lines four through 9:

13 (Reading) QUESTION: During this period of time, the  
14 2001 to 2001 period of time until you left, did you get a lot  
15 of pressure from the people above you to improve your margins?

16 ANSWER: There was a change in management and the  
17 pressure became very aggressive.

18 Do you recall being asked that question and giving  
19 that answer?

20 A No, I don't remember the question or the answer, but it's  
21 relatively true, yes. There was a change in management and the  
22 pressure became very aggressive, yes.

23 Q Let's step back to 1999 for a moment. Let's take a look  
24 again at that DX-1370, those were the notes of Mr. Underdown at  
25 Hickory Springs about conversations with you that we were

1 looking at earlier.

2 If you turn to the page 9, do you see near the bottom  
3 of the page an entry for a meeting between you and Mr.  
4 Underdown on March 23rd, 1999 at 3:30 p.m.? Do you see that,  
5 sir?

6 A Yeah. It's highlighted now, I can read it.

7 Q Mr. Underdown wrote, quote: Rick -- that would be you.  
8 Right?

9 A Correct.

10 Q -- (Reading) Rick says that as of 8:25 a.m. this morning,  
11 Dow's polyol and TDI prices will be up \$.06 pound April 1,  
12 closed quote.

13 A Okay.

14 Q You don't have any reason to doubt the accuracy of what Mr.  
15 Underdown reported here, do you, sir?

16 A It's 1999, but with -- I really -- the price had to go up  
17 April 1st, okay? So 3/23, probably saying that the prices were  
18 going up, yes.

19 Q And so do you recall as it says here, that Dow had  
20 announced the price increase to Hickory Springs for TDI and  
21 polyols for April 1, 1999?

22 A It would have been for April '99 on a quarterly basis, yes.

23 I don't see that there though.

24 Q It's not there. But you're pretty certain it happened  
25 given this entry in his notes?

1 A Well, it looks like he's saying something on March 23rd, so  
2 we announced a price increase for April 1st, so we're saying  
3 the prices are up, yes.

4 Q Mr. Underdown reports that you told him that you were,  
5 quote, on the phone with Charles -- I guess that's Charles  
6 Churet. Right?

7 A Yeah, spelled wrong but that's him.

8 Q A phonetic spelling there, huh? And thought -- and thought  
9 he had him convinced to hold up the price increase, but he  
10 failed.

11 That would be "you failed." Right?

12 A (After pause) I guess I'm reading through that. Let me  
13 read it again.

14 He said he was on the phone and then -- and thought he  
15 had him convinced --

16 Q "He" is "you" there, sir.

17 A Okay.

18 Q He is Rick.

19 A Okay. I'm rereading it. I'm sorry.

20 Q He's reporting on what you're telling him.

21 A Okay. I'm rereading it. Okay?

22 Q Sure.

23 A He said he had -- he thought he had him convinced to hold  
24 up the price increase, but he failed. So...

25 Q You had tried to convince Mr. Churet to hold up on the

1 4/1/99 price increase. Right? That's what Mr. Underdown is  
2 reporting?

3 A Well, looks like I'm trying to hold up not increasing the  
4 price (sic), but I failed. Okay?

5 Q Yes, you failed.

6 You were unable to persuade Mr. Churet, and he decided  
7 to move forward with the price increase anyway. Correct?

8 A Well, in order to get the price increase he had to have the  
9 committee agree to it.

10 Q Well, that may be true, sir. But the fact of the matter  
11 is, you went to Mr. Churet and tried to get him to hold up on  
12 the price increase according to these notes. Correct, sir?

13 A Okay. I guess I was reading it -- I was reading that we  
14 hold up the price increase, keep the \$.06 up.

15 Q No, sir.

16 A Okay, I was reading it wrong. I'm sorry.

17 Q Okay. You understand now that you went to Mr. Churet and  
18 tried to convince him not to raise the price?

19 A To not raise the price.

20 MR. STREETER: Your Honor, I'm going to put an  
21 objection in here. This is a document that --

22 THE COURT: No, no, no. Overruled. I'll allow this  
23 line of questioning.

24 Go ahead.

25 Q Now, sir, this was the time period when Europe, Mr. Churet

1 was calling the shots on North American price increases.

2 Correct?

3 A He had to work through his team. It was not individual  
4 announcing price. He had to get approval from the lawyers,  
5 also from the -- his two business guys --

6 Q Wherever he had to get approval of --

7 MR. STREETER: I object.

8 Q -- you were going to him --

9 MR. STREETER: Your Honor, objection. The witness was  
10 in the middle of an answer.

11 THE COURT: All right. Go ahead, Mr. Beitel, go  
12 ahead, answer it.

13 A In order to get a price increase Charles Churet might have  
14 been in charge of the thing but he still had to get approval  
15 from the business guys of running the business in North America  
16 along with getting approval from Bob Wood.

17 Q You didn't seek to stop the price increase by going to talk  
18 to the business guys, you went to Charles Churet, didn't you,  
19 sir?

20 A You know, I hate to tell you this, it's so long ago, I  
21 don't recall doing that. But it might have been we all agreed  
22 to a price increase and I went back and said it wasn't going to  
23 fly at that particular time in April.

24 Q Let's turn to the next page, maybe we'll refresh your  
25 recollection here a little bit.

1 A 1999?

2 Q So if you turn to the next page, on page 10 about halfway  
3 down the entry, starting with the "he again stated there."

4 Yeah.

5 The next couple of sentences there.

6 He again stated: (Reading) That us -- Hickory  
7 Springs -- taking 10 million pounds of polyol and four million  
8 pounds of TDI from them -- Dow -- was helping his case because  
9 this is not the right time to increase prices with Bob Wood and  
10 Charles. That's Charles Churet. Right?

11 A Right.

12 Q So what you were actually suggesting here to Mr. Underdown  
13 is that he take business away from Dow to make a point with Bob  
14 Wood and Charles Churet. Correct, sir?

15 A I don't know the whole paragraph in there.

16 He again stated that he was -- us taking 10 million  
17 pounds plus -- from them -- was helping the case that this is  
18 not the right time to increase price -- oh, so Hickory was  
19 taking the business away from us.

20 Q Yes, sir.

21 And you suggested that that was helping your case;  
22 helping his case, that this was not the right time to increase  
23 prices with Bob Wood and Charles Churet. Right?

24 A I was getting feedback from the customer that if we did  
25 that we'd lose that much business, so I'm undoubtedly feeding



1 it back to Bob Wood and Charles Churet.

2 Q You were going to go back to the bosses and say, we just  
3 lost business, this is not the right time for the price  
4 increase. Right?

5 A I was feeding back information of what the customer was  
6 telling me, yes. I was not the decision-maker.

7 Q And you didn't agree with Mr. Churet or Mr. Wood because  
8 you thought it wasn't the right time for Dow to increase  
9 prices. Right?

10 A It looks like with this documentation in '99, probably the  
11 timing was wrong, yes.

12 Q Now, Mr. Underdown responded to you, quote: I told him --  
13 that would be you -- that this was exactly what I feared when  
14 they -- meaning Dow -- moved their polyurethane management to  
15 Europe.

16 And that was, in fact, the case: Dow had moved its  
17 polyurethane management to Europe?

18 A Only the one individual. The rest of the business team  
19 still stayed in Midland, Michigan.

20 Q And that one individual, the man in charge was Charles  
21 Churet. Correct, sir?

22 A For that short period of time he was in charge reporting to  
23 Bob Wood, who was the real boss.

24 Q It's fair to say that Mr. Underdown was critical of Dow's  
25 polyurethane management in Europe, and Mr. Churet specifically.

1 Correct, sir?

2 A Correct.

3 Q Mr. Underdown was critical of Dow's management because Dow  
4 was trying to push through price increases that he felt were  
5 unwarranted. Correct?

6 MR. STREETER: Objection. Your Honor, there's no  
7 foundation for that.

8 THE COURT: No, it's cross-examination. He can ask  
9 him, if he can answer it.

10 Go ahead.

11 Q Go ahead, sir, you can answer.

12 A I thought they felt any increase was unwarranted, Hickory  
13 Springs.

14 Q I'm talking about this case in particular. He was critical  
15 of Dow's management being in Europe, he was critical of this  
16 price increase. Correct, sir?

17 A Charles Churet was in Europe, the rest of the management  
18 with Bob Wood was in Midland, Michigan though.

19 Q I understand that, sir. But in this communication between  
20 you two, Mr. Underwood was critical --

21 A Of Charles Churet.

22 Q -- of Charles Churet?

23 A Right.

24 Q And this price increase in particular. Correct, sir?

25 A Looks like it, yes.

1 Q And you agreed with Mr. Underdown. Correct?

2 And I said "Underwood" a moment ago. Too much "House  
3 of Cards."

4 A Okay.

5 Q And you agreed with Mr. Underdown. Correct?

6 A Going back that far, looks like the timing wasn't right to  
7 get an increase in the middle of the year, yeah.

8 Q Okay. Now, Stephanie Barbour testified in this case that  
9 there was an incident, and she pegged it at about 1998 to 1999  
10 when Mr. Churet was the commercial director for the U.S. in  
11 Europe, and when Mr. Churet came to Dow's offices in Midland --  
12 you mentioned he came to Midland from time to time. Right?

13 A Right.

14 Q And apparently Mr. Churet was insisting on a price  
15 increase.

16 She says that you and her argued against the price  
17 increase because you and her didn't think the price increase  
18 was supported by supply and demand.

19 Do you remember that, sir, with Mr. Churet arguing  
20 against the price increase with Stephanie Barbour?

21 A I remember arguing times about not having a price increase  
22 at those periods of time, yes.

23 Q And indeed her testimony is consistent with what Mr.  
24 Underdown is reporting here. Correct, sir?

25 MR. STREETER: Objection.

1 A I --

2 THE COURT: No. Overruled. Go ahead.

3 A What did she say?

4 Q She said that you two were arguing against Mr. Churet about  
5 instituting a price increase because supply and demand factors  
6 didn't support the increase.

7 A Made sense to me that we -- she was running part of that  
8 business, so her along with other people would be arguing about  
9 when to do it and so forth. They had the bottom line  
10 responsibility.

11 Q And you were one of the people arguing against it, because  
12 supply and demand didn't match -- didn't justify a price  
13 increase. Correct?

14 A Correct. And I'd have to do with it the customers because  
15 I was involved with selling the product.

16 Q And you were the front line guy. Right?

17 A Correct.

18 Q And Mr. Churet could sit back and say: Institute the price  
19 increase. He didn't have to deal with Mr. Underwood. Right?

20 A He didn't have to deal with certain of the customers, yes.

21 Q Underdown. Excuse me.

22 Did you know that Mr. Churet was pushing price  
23 increases because he was having pricing discussions with Dow's  
24 competitors at trade association meetings?

25 A No, I did not.

1 Q Now, if we move up in that paragraph on page 10 of Mr.  
2 Underdown's notes, he writes, starting with "Foamex is in  
3 trouble," He writes: (Reading) Foamex is in trouble because  
4 Dow has them at 50 percent allocation and they cannot get all  
5 they want from anybody else. He said BASF is Foamex's second  
6 largest TDI supplier. He said that Foamex is trying to save  
7 themselves by driving the cost of chemicals down and trying to  
8 make sure that it only happens there. Said it won't happen.  
9 Anything that goes on at Foamex will get passed to everyone  
10 else sooner or later. Said this won't get settled out anywhere  
11 until everyone settles with Foamex.

12 Do you recall that conversation, sir?

13 A No, I don't.

14 Q Well, Dow was trying to get prices up at Foamex. Correct?

15 A Like everyone else, yes.

16 Q And Dow was Foamex's biggest TDI supplier. Correct?

17 A At the time, yes.

18 Q And BASF was Foamex's second largest TDI supplier.

19 Correct?

20 A They had more than one supplier, I just don't know which  
21 one was number two and which was number three.

22 Q And Foamex was in trouble here because they couldn't get  
23 enough TDI supply. Right?

24 A Undoubtedly the TDI market was tight.

25 Q And Foamex was trying to get this better TDI price, but you

1 reported to Mr. Underdown, you said: It won't happen.

2 You see that, sir? "Said, it won't happen." That's  
3 you, isn't it, sir?

4 A Telling Underdown that it won't happen. Right? Is that  
5 what you're saying?

6 Q Correct.

7 A I guess I said it back there. I don't know.

8 Q And he goes on reporting your discussion with him:

9 (Reading) If Dow and BASF got prices up at Foamex, it would  
10 only be a matter of time until other customers' prices went up,  
11 too.

12 Correct?

13 A You had to announce a price increase to everybody at the  
14 same time. So you couldn't do one without the others because  
15 you had to do it on a quarterly basis and announce that your  
16 TDI price was going up.

17 Q And that's exactly what actually happened eventually,  
18 right, Dow's prices went to Foamex and everybody else on July  
19 1, 1999. Correct?

20 A I can't remember July 1, 1999, I'm sorry.

21 Q Well, if you look-back at page 8 of Mr. Underdown's notes,  
22 7/26/1999, a call at 3:27 p.m., you go down to -- in the first  
23 paragraph towards the end: "Dow gave Foamex chems at old price  
24 in June and prices up \$.06 July 1."

25 You see that, sir?

1 A Yes.

2 Q Does that confirm for you that, in fact, that's what  
3 happened and everybody's prices went up because you got the  
4 prices at Foamex up \$.06 a pound. Right?

5 A July 1st, 1999 is too long for me to remember exactly what  
6 happened to everybody else, I'm sorry.

7 Q But you don't have any reason to doubt the accuracy of what  
8 Mr. Underdown down is reporting here, do you? These are your  
9 conversations with him.

10 A (Reading/mumbling) Announce a major restructuring August,  
11 said that they would write office in September, Dow gave Foamex  
12 at the old price in June, price is up -- well, we're talking  
13 the price went up July 1st, yeah.

14 Q Okay. Let's move forward now to 2000.

15 Let's take a look at PX-707. This is a document that  
16 was produced from Dow's files. First, if you turn to the  
17 second page, do you see your name there?

18 A Correct.

19 Q The title of this document in the front is "Price Recovery  
20 2000." Do you recognize this as a memorandum that you  
21 prepared?

22 A Probably would help.

23 Q Do you recognize it? I mean, it's got your name on it. It  
24 may be too long ago.

25 A Yeah, it's almost 16 years ago.

1 Q Right. But it's got your name on it. You probably  
2 prepared the memo?

3 A Involved in preparing the memorandum.

4 THE COURT: Mr. Beitel, you have to speak into the  
5 microphone.

6 THE WITNESS: I'm sorry, sorry.

7 THE COURT: You can pull the microphone closer, it  
8 moves. The base of the microphone.

9 JUROR NO. 4: Thank you.

10 Q Okay. Just to make sure, you don't have any reason to  
11 doubt that this is something that was either prepared by you or  
12 at your direction?

13 A When you have documents like that, you have communication  
14 people helping you prepare the documents. I don't sit at my  
15 desk writing out long things like that. So there's data and  
16 communication that goes back-and-forth, just the information to  
17 get it looking good.

18 MR. JOHNSON: Move the admission of PX-707.

19 THE COURT: No objection? It's --

20 MR. STREETER: No objection.

21 THE COURT: All right. It's in evidence then.

22 Q I will represent to you that the metadata data from this  
23 document indicates that it was created on June 26, 2000. All  
24 right, sir? You prepared this shortly --

25 A I can't.



1 Q -- after you took over as the commercial director -- I'm  
2 sorry?

3 A I can't see anything.

4 THE COURT: He's having --

5 Q Oh, it doesn't have a date on it. When I said the  
6 "metadata data," that's the electronic data underlying this  
7 document --

8 A Okay.

9 Q -- shows that it was created on June 26th, 2000.

10 MR. STREETER: Your Honor, counsel is now testifying.  
11 This is not evidence.

12 THE COURT: Do you dispute that?

13 MR. STREETER: I don't know. I don't have the  
14 metadata data in front of me.

15 MR. JOHNSON: Here's the metadata. You can look at  
16 it.

17 THE COURT: Based on that representation, go ahead,  
18 ask the question.

19 MR. JOHNSON: Thank you, your Honor.

20 BY MR. JOHNSON:

21 Q You prepared this shortly after you took over as commercial  
22 director in North America, right, given that date, June 26,  
23 2000?

24 A I'm assuming that's the date I became commercial director.

25 THE COURT: Mr. Beitel, you're going to have to move

1 that microphone closer to you. No, it goes -- it bends down a  
2 little bit.

3 THE WITNESS: Okay. It bends down like this?

4 Like this? Sorry.

5 THE COURT: And speak into that, please.

6 THE WITNESS: Sorry?

7 THE COURT: Okay.

8 A The question again, please?

9 Q Yes.

10 If you look at the first paragraph of the price  
11 recovery 2000 memo, you say that, starting with the second  
12 sentence: You say that Dow announced a price increase on  
13 polyols and TDI effective April 1, and that, quote, these have  
14 had a partial success in certain market segments, closed quote.

15 You see that, sir?

16 A Now I see it, yes.

17 Q And that was a true statement. Right, sir?

18 A I assume it was, yes.

19 Q You then said that Dow was entering a new phase of price  
20 increases that you started May 15th, 2000, with increases on  
21 polyols, \$.07 a pound; TDI \$.07 a pound; MDI \$.08 a pound.  
22 Right?

23 A And systems, \$.07 a pound, yeah.

24 Q Yeah, Systems is not really relevant to our discussion.

25 A Okay.

1 Q So this was the current state of play when you wrote this  
2 on June 26, 2000. Right?

3 A I assume it was, yes.

4 Q And you also wrote in the second paragraph: "We have had  
5 strong support by our two major competitors, Bayer and BASF, in  
6 their market segments." Correct?

7 A Correct.

8 Q Is that consistent with your recollection that Bayer and  
9 BASF were strongly supporting Dow's price increases?

10 A The period there, 2002 -- 2000 -- was a very low period for  
11 pricing, so, yes, I would assume that they were following  
12 someplace or leading.

13 Q And you write further, and you actually underline it in the  
14 third paragraph: "We need these price recoveries." Correct?

15 A Correct.

16 Q And a little bit later in the next paragraph down at the  
17 end you underline: "We must change this erosion in  
18 profitability for our business." Correct?

19 A Correct.

20 Q Okay. So, do your comments here reflect the pressure that  
21 you spoke about to us earlier, that Dow was under -- was  
22 placing you under pressure to increase margins and call in the  
23 polyurethane business when you took over as commercial  
24 director?

25 A Taking over commercial director I had responsibility for

1 sales and marketing, so the team would tell me: Here what's  
2 you need to do from a marketing and sales standpoint to  
3 increase our margin.

4 Q And my question to you simply is: Does this memo reflect  
5 that pressure you talked about earlier, getting very aggressive  
6 on raising prices?

7 A During that time period, yes.

8 Q Let's take a look now at PX-176. Sir, I'll represent to  
9 you that this is a folder of Bill Bernstein's documents  
10 relating to BASF's customer Woodbridge who is plaintiff in this  
11 case.

12 Now, Woodbridge, as I think we established earlier,  
13 was a Dow customer in August of 2000. Correct?

14 A I assume they were still a customer then, yes.

15 Q If you turn to page 4 of this exhibit --

16 MR. JOHNSON: And highlight the top line there. Yeah,  
17 that's fine.

18 Q Mr. Bernstein testified that these were his own handwritten  
19 notes --

20 MR. STREETER: Objection, your Honor. Foundation.  
21 It's a document written by Mr. Bernstein. The witness has  
22 never seen it.

23 THE COURT: Sustained, Mr. Johnson.

24 Q Do you see at the top of the page next to the date August  
25 3rd, 2000, Mr. Bernstein on those dates called out the price --

1 MR. STREETER: Your Honor, there's an objection.

2 THE COURT: Go ahead.

3 MR. STREETER: -- which I understand has been  
4 sustained.

5 THE COURT: Yeah.

6 Q My question to you, sir, is: Were you the person at Dow  
7 Mr. Bernick called about prices not up in August?

8 THE COURT: Without referring to that, ask him the  
9 question.

10 MR. JOHNSON: Sure.

11 Q Did you call, sir, Mr. Bernstein in August of 2000 about  
12 prices not being up in August?

13 A Sorry, I don't recall what happened August 2000.

14 Q Okay. Do you recall talking to Mr. Bernstein about not  
15 getting your prices up in August at all?

16 A Bernstein was a customer we sold product to. So it could  
17 be that I didn't get his prices up.

18 Q Let's turn to PX-307.

19 This is an email from you to Marco Levi, David Fischer  
20 and others at Dow dated August 6th, 2000.

21 Do you see that, sir?

22 A Yes.

23 MR. JOHNSON: I move the admission of PX-307.

24 MR. STREETER: No objection.

25 THE COURT: All right. It's in evidence then.

1 Q You wrote this email in response to an email below from Mr.  
2 Levi dated August 4th, 2000. Correct?

3 A Yes, I assume.

4 Q In terms of timing, you wrote your email three days after  
5 Mr. Bernstein made that notation on the Woodbridge file that we  
6 looked at a moment ago, just in terms of timing. Do you  
7 understand that, sir?

8 A I assume.

9 Q Okay.

10 A I didn't see it.

11 Q Now, at this point in time, at the time of your email, you  
12 and Mr. Levi felt that Bayer was being too aggressive in the  
13 marketplace. Right?

14 A I was trying to read, I'm sorry. I lost -- I couldn't see  
15 the --

16 MR. JOHNSON: Let's see if we can bring it up on his  
17 screen a little bigger there. The first paragraph.

18 A It was there and then phased out.

19 MR. JOHNSON: The first paragraph, yeah. Bring that  
20 out. That should help.

21 Q So the question to you that you and Mr. Levi felt that  
22 Bayer was being a little too aggressive in the market with  
23 respect to Woodbridge.

24 A I see that, yes.

25 Q And Dow was worried that Bayer might take away some of the

1 business from your customer Woodbridge. Right?

2 A Correct.

3 Q But at least at this point in time nothing had happened  
4 yet, Bayer had not yet moved on the Woodbridge account.  
5 Correct?

6 A Is that written further down the statement there?

7 When we are sure that they are not -- okay.

8 Looks like we were not sure we lost the business yet.

9 Q This email was about what you would do if Bayer made a  
10 move. Correct?

11 A (After pause) It looks like in the conversation that if  
12 Bayer made a move, we'd make a move someplace else to move our  
13 product, yes.

14 Q So you were thinking about retaliating against Bayer and  
15 another customer if they took your business away at Woodbridge.  
16 Right?

17 A If you lost the business someplace, you had to go someplace  
18 else to sell the product to keep the price running smoothly.

19 Q But you weren't going to do that until you were sure  
20 whether or not you really lost the business at Woodbridge.  
21 Right?

22 A Correct.

23 Q Now, that's because Dow had announced price increases and  
24 was trying to get the prices up at that point in time.  
25 Correct?

1 A So we're raising them July 1st, is that -- I assume when  
2 you raise the prices you try to hold your own market share and  
3 not go out and steal business from somebody else.

4 Q Well, maybe it would refresh your recollection when you  
5 look in the third paragraph there.

6 MR. JOHNSON: If you could highlight the first  
7 sentence of that third paragraph there.

8 Q Quote: We have rank the accounts -- I assume you meant  
9 "ranked" -- the accounts and stayed away from BASF since they  
10 are supporting the increases.

11 Does that refresh your recollection that Dow had  
12 announced price increases and that you had ranked the accounts  
13 and you were going to stay away from BASF because they were  
14 supporting the price increases?

15 A If you're supporting a price increase and both of you are  
16 raising the same price, you don't go attack somebody else's  
17 account and try to steal it away if you're trying to get your  
18 prices up. So if we were both going up with accounts, you  
19 wouldn't attack a BASF account.

20 Q Well, in fact, you had ranked the accounts. You actually  
21 knew who was supporting the price increases and who wasn't.  
22 Right?

23 A Well, we'd know who we supplied to and typically we knew  
24 who our competitors were supplying to those accounts to.

25 Q Yes. And in order to rank the accounts you had to know



1 what they were doing. Correct?

2 A Well, I had to know what BASF was doing at those accounts  
3 because we probably heard what they were doing at the accounts.

4 Q Sure. So you were staying away from the customers of your  
5 competitors who were supporting price increases, but you were  
6 preparing to attack a competitor if they did not support the  
7 price increase. Correct?

8 A If we lost the business at Woodbridge we had product of  
9 flexible molded grade that we needed to move someplace, so we  
10 would have to look at what accounts would buy that particular  
11 product in order to keep the plant functioning well. So you  
12 had to look someplace else to sell the product that wasn't  
13 being sold to Woodbringe anymore.

14 Q Okay. The bottom line is though, Dow -- and you stated  
15 here -- was going to stay away from BASF's accounts because  
16 they were supporting the price increases. Correct, sir?

17 A If their price is going up at an account, we were at that  
18 account, why attack and take away the BASF business that was  
19 going on? We would look for other places to move the product  
20 where Bayer was, yes.

21 Q Do you recall playing golf with Mr. Bernstein and other  
22 BASF employees a little later that month in August?

23 A I didn't until I saw the information I played with -- I  
24 knew I played with them; I didn't know who all was at that  
25 outing.

1 Q Let's take a look at PX-90.

2 This is a series of emails between Bill Bernstein at  
3 BASF and your Dow colleague, Don Marquette, between July 7 and  
4 July 10, 2000. Do you see that, sir?

5 A Okay. From Bill to Don, okay.

6 Q And wouldn't it was Don Marquette?

7 A Don Marquette was really the carpet sales manager --

8 Q You have to speak into the microphone.

9 A Sorry. Don Marquette was really the corporate sales  
10 manager based in Philadelphia. They had all the major accounts  
11 in the New York/Philadelphia area.

12 MR. JOHNSON: Move the admission of PX-90.

13 MR. STREETER: No objection.

14 THE COURT: It's in evidence then.

15 Q Mr. Marquette and Mr. Bernstein are setting up a golf  
16 outing between BASF and Dow for August 29th, 2000. Correct,  
17 sir?

18 A It looks like it, yes.

19 Q And that golf outing took place in August 29th, and you  
20 attended. Correct?

21 A Correct.

22 Q You and Mr. Fischer, among others, spent the whole day with  
23 Mr. Bernstein and others at BASF. Correct?

24 A Meeting and golf, yes.

25 Q Well, it's fair to say as of the time that Mr. Bernstein

1 wrote this on July 7th, there was no specific business purpose.

2 Isn't that correct, sir?

3 A We called the meeting because we had the people there. We

4 did have a business meeting before we played any golf.

5 Q Well, he says -- where it says, "We should try" --

6 MR. JOHNSON: Could you highlight that sentence,

7 please.

8 Q He says: (Reading) We should try and develop some issues

9 to discuss in a.m. and plan golf in the p.m. after lunch.

10 So the time this was being put together, there wasn't

11 even an agenda or an issue to be discussed. Correct?

12 A The meeting was just being set up, right.

13 Q Right. So you didn't really have a business purpose at

14 this point. There was going to be maybe some business

15 discussion in the morning as an excuse to play golf. Right?

16 A Well, with that many people flying in there had to be some

17 business involved.

18 Q And you certainly do not recall Mr. Marquette ever putting

19 together a formal agenda for this meeting. Correct?

20 A Typically Marquette just put together the meetings and

21 entertained customers.

22 Q You do not recall anybody putting together a formal agenda

23 for this meeting. Correct?

24 A No, I don't at this time.

25 Q This is just a chance to play golf with your buddies at

1 BASF. Correct?

2 A Some of the people I knew at BASF.

3 Q And this was the same competitor, BASF, that Dow wasn't  
4 going after because they were supporting Dow's price increases.  
5 Right?

6 A It was also the same people we were selling product to.

7 Q Do you recall that Dow announced a polyol price increase on  
8 November 9th, 2000 to go into effect January 1st, 2001?

9 A Sorry. November -- for January 1st when? 2000 --

10 Q The increase announcement was November 9th, 2000 to go into  
11 effect January 1, 2001.

12 A I don't recall, but typically we gave 45-day notification  
13 before the date of the implementation of the price increase.

14 Q Okay. Let's go to PX-1414.

15 This is a summary exhibit that the parties have agreed  
16 accurately cites all the price increases through the entire  
17 period of -- that is relevant to this case.

18 If you would turn to be -- if we could turn to page 10  
19 of this summary. Can you see there on page 10 -- and you have  
20 to actually look at the prior page to see it's polyols -- and  
21 you'll see the top heading is: "Dow, \$.10 a pound, 11/9/2000."

22 Do you see that, sir?

23 MR. JOHNSON: Can we highlight it for him?

24 A I see it now, 11/9/ 2000, Dow, \$.10.

25 Q If you go --

1 A Is that polyol?

2 Q Yes, that's polyol.

3 If you go to the prior page, you'll see in the product  
4 class, which is the second column...

5 MR. JOHNSON: Can we highlight polyols in the second  
6 column on page 9, please.

7 Q And then if you look in the first column, you'll see it had  
8 an effective date of 1/1/2001.

9 Do you follow that, sir?

10 A Yes.

11 Q Okay. And Dow was the chemical manufacturer that usually  
12 led polyol price increases. Correct?

13 A In certain market segments, yes.

14 Q Let's turn to PX-708.

15 Do you recognize this as a memo you wrote?

16 A I'm sorry. I can't read it unless it's --

17 MR. JOHNSON: Maybe we can --

18 A Okay.

19 MR. JOHNSON: -- highlight the little initials down at  
20 the bottom left-hand corner there.

21 Q Maybe that will help. "RLB"; that would be you. Right?

22 A My initials, yes.

23 Q Right.

24 MR. JOHNSON: Move the admission of PX-708.

25 MR. STREETER: No objection.

1 THE COURT: It's in evidence then.

2 Q I will represent to you again that the metadata shows that  
3 you created this memo, or someone created it on your behalf on  
4 November 13th, 2000.

5 MR. JOHNSON: Would you like to see the metadata?

6 MR. STREETER: No. Thank you.

7 A When was this created? I'm sorry.

8 Q November 13th, 2000.

9 A November 13th, 2000. Okay.

10 Q And just to put that in context, that was four days after  
11 Dow announced its polyol increase on 11/9. Correct?

12 A Okay.

13 Q 9th to the 13th. All right?

14 So let's go down to the heading, "Price Increases."  
15 Do you see that?

16 MR. JOHNSON: Can we highlight that? Bring it up for  
17 him so he can see it.

18 A Could you go all the way to the bottom first?

19 Q Sure. Do you want to see something at the bottom?

20 A Yeah.

21 Q Just the initials again?

22 A Okay.

23 Q Okay? Are we good?

24 A I've never seen it -- a report like this before, so I  
25 just --

1 Q Okay. We're going to "Price Increases," and this document  
2 is titled "North America."

3 A Okay.

4 Q And let's look at the second bullet point there: "Polyol  
5 \$.10 increase announced for 1/1/2001."

6 That's the announcement we just looked at from Dow in  
7 PX-1414. Right?

8 A Okay.

9 Q Now, the next bullet point says: "Need TDI price  
10 announcement. Need MDI leadership."

11 You were referring to the fact that you were expecting  
12 somebody else in the industry to go there making the opening  
13 TDI and MDI price announcements. Right?

14 A Really effective in the foam industry, you need two pounds  
15 of polyol, one pound of TDI to make the application. So if  
16 you're doing pricing you really want both prices go up the same  
17 time for polyol and TDI for those applications, not one go up  
18 and the other. So you usually look at sometimes the TDI price  
19 increase being roughly at the same time as the polyol increase  
20 to the flexible slab and molded business.

21 Q I appreciate that, sir, and now I'd like you to answer my  
22 question.

23 A Okay. What was it?

24 Q My question was: In this bullet point you were referring  
25 to the fact that you were expecting somebody else in the

1 industry to go there, make the opening TDI and MDI price  
2 announcements. Right?

3 A Correct.

4 Q Next bullet point: "Bayer needs to support and position  
5 polyol and TDI."

6 You were expecting that to happen. Correct, sir?

7 MR. STREETER: Objection to the "expecting," your  
8 Honor.

9 THE COURT: I'll allow it. Overruled.

10 A No. I don't -- I think I wasn't expecting. I think in  
11 order to get it to be successful Bayer needs to do something.  
12 If they don't do anything, the thing will fall apart because  
13 they're so large in those areas.

14 Q Let's turn to your testimony in February 2013, page 3620,  
15 lines 12 through 15.

16 A I forget. Exactly what date was this, 2013 when?

17 Q This was November 13th, 2000.

18 A November?

19 Q 13th, 2000 is the date of this memo. Okay? Are you with  
20 me?

21 A Okay. This is -- the memo? When was the other --

22 Q Oh, the testimony?

23 A Yes.

24 Q That was in February of 2013.

25 A February, okay. Thank you.



1 Q Sure.

2 Do you recall being asked the following question:

3 Next bullet point -- which is the bullet point we were just  
4 looking at: Quote, Bayer needs to support and position polyol  
5 and TDI, closed quote.

6 So you were expecting that to happen?

7 ANSWER: According to this note, yes.

8 Did you give that testimony, sir?

9 A Looks like I did.

10 Q Was it accurate at the time?

11 A What I was saying was --

12 Q Sir, was it accurate at the time?

13 MR. STREETER: Objection, your Honor, he --

14 THE COURT: No, whether or not that's an accurate  
15 representation of what you said at the time is a fair question.

16 A That's what I said.

17 Q In the same bullet point you say at the end, quote: BASF  
18 will follow, closed quote.

19 You were expecting that to happen too. Correct, sir?

20 A Yes.

21 Q Now, in fact, what you wrote here is exactly what did  
22 happen. Correct?

23 A I guess.

24 Q Well let's go back to PX-1414, page 9 at the bottom. And  
25 this is again with respect to polyols and TDI.

1           So you wrote on the 13th of November that Bayer needs  
2       to support and position polyol and TDI. And the summary chart  
3       shows that on November 17th that Bayer, in fact, issued a price  
4       announcement for polyols, \$.10 a pound, a couple of days after  
5       you wrote that memo. Correct, sir?

6       A     I guess, yes.

7       Q     And you also wrote on the 13th that BASF will follow. In  
8       fact, that's what happened. On November 27th BASF did, in  
9       fact, follow. Correct?

10      A     Correct.

11      Q     And when you wrote on November 13th that BASF will follow,  
12      you didn't say they may follow, they might follow; there was no  
13      maybes there. Correct?

14      A     That's what I said, "they will follow," yes.

15      Q     Instead, you said that BASF will follow. And that was very  
16      concise, wasn't it, sir?

17      A     BASF followed a lot when you did increases but sometimes  
18      they didn't.

19      Q     Sir, can you answer my question?

20      A     Okay.

21      Q     You said that BASF will follow. And that was very concise,  
22      wasn't it, sir?

23      A     For that time, that's what I said.

24      Q     Let's turn to 2002.

25           Do you recall that Dow announced polyol and TDI price

1 increases to be effective March 1st, 2002?

2 A March 1st?

3 Q Yes, sir.

4 A Could I see it?

5 Typically we announced them to be on the quarter, not  
6 in the middle of the -- it would be like April 1st, not March  
7 1st.

8 Q We have this handy-dandy summary chart, so if you would go  
9 back to it, PX-1414, and go to pages 13 and 14. And do you see  
10 there that the polyol price increase by Dow of \$.10 a pound  
11 with an effective date of March 1st, 2002 on page 13? Do you  
12 see that there, sir?

13 A I see it now, yes.

14 Q And the TDI increase, if we look over on the next page for  
15 Dow, that was \$.15 per pound. Right?

16 A I see it, yes.

17 Q Okay. Let's turn now to PX--

18 A What was the effective date of that one?

19 Q The same effective date, March 1st, 2002.

20 All you have to do is turn to the prior page and read  
21 off the column.

22 A Okay. I didn't do that.

23 Q Let's turn to PX-699.

24 Do you see that this is a Dow presentation from Steve  
25 English dated March 28th, 2002. Correct?

1 A That's what it says, yes.

2 Q And that's a few weeks after the effective date of the Dow  
3 polyol and TDI price announcements that we just looked at.

4 Correct?

5 A Yes.

6 Q Please turn to page 17 of this presentation.

7 The title of this slide is "Successes."

8 Do you see that, sir?

9 A Yes.

10 Q And if you look down at pricing, it says: "We announced  
11 \$.10 on polyols March 1st, we announced \$.15 on TDI March 1st,  
12 2002. And it's working." Correct, sir?

13 A Yes, I see that.

14 Q As of this time Dow was getting the March 2002 price  
15 increases to stick in the marketplace. Correct?

16 A That's what it says, yes.

17 Q And all of your competitors have followed you in a  
18 lock-step fashion. Isn't that correct, sir?

19 MR. STREETER: Objection, your Honor.

20 A I'm not sure.

21 THE COURT: Okay.

22 Q Well, you can look back --

23 THE COURT: Yeah. I'll allow the question.

24 Overruled. Go ahead.

25 Q You can look back if you like to 1414. Do you want to see

1       what your competitors did?

2       A     Looks like they had similar pricing.

3       Q     They had the same pricing, sir --

4       A     Okay.

5       Q     -- with the same effective date. Right?

6       A     That's what it shows, yes.

7       Q     All right. Sir. Let's turn to August of 2002.

8               Do you remember being in Lucerne, Switzerland --

9               MR. JOHNSON: Oh, a reminder. I move admission of

10      PX-699.

11              MR. STREETER: No objection.

12              THE COURT: It's in evidence then.

13      Q     Do you remember being in Lucerne, Switzerland in August  
14      2002 for a global business meeting for polyurethane?

15      A     Yes.

16      Q     And at that time Mr. Fischer was based nearby in Horgen --  
17      I'm probably mispronouncing that -- Switzerland. Right?

18      A     He was based in Switzerland, yes.

19      Q     So that's why you ended up going over there, because Mr.  
20      Fischer was the boss and he said, you guys come over here.  
21      Right?

22      A     For the meeting, yes.

23      Q     And on August 6th, the second day of the business meeting,  
24      Christian Buhse from Bayer came all the way down from Germany  
25      to meet with you and Mr. Levi for lunch at the hotel in

1 Lucerne. Right?

2 A I met with him for lunch. It was set up the last minute  
3 for me to join that luncheon.

4 Q You were a little surprised that these guys from Bayer came  
5 all the way down from Germany to meet you and Mr. Levi.  
6 Correct?

7 A Yes.

8 Q Do you recall that a few days before you and Mr. Levi met  
9 with Bayer's Christian Buhse on August 6th, that Bayer had  
10 announced price increases for polyols and TDI?

11 A No, I don't recall that, no.

12 Q If you turn to PX-1414 again.

13 And turn to page 15 and 16. You'll see that Bayer  
14 announced the price increase on polyols of \$.06 on August 1,  
15 2002.

16 A Yes, I see it.

17 Q And that was just five days before your meeting in Germany  
18 with Mr. Buhse on August 6th. Correct?

19 A Yes.

20 Q Now, BASF and Lyondell also announced on August 1st. Do  
21 you see that?

22 A It's not BASF, I thought before it flipped off. I'm sorry.

23 Q Actually if you look over to the next page on 16, maybe we  
24 can -- I don't know if we can get these all brought out -- but  
25 we've got polyol increases by BASF, Bayer, Dow and TDI

1 increases by BASF, Bayer, Dow, Huntsman and Lyondell. Do you  
2 see that, sir?

3 A The print is too small. I assume it's -- okay, there it  
4 goes.

5 Q You see that?

6 A Yeah. But I can't tell what product it is.

7 Q Okay. It is polyols and TDI we're talking about here, all  
8 with effective date of 9/1/2002.

9 A Okay.

10 Q Do you recall that on the same day you and Mr. Levi met  
11 with Mr. Buhse August 6th, Dow announced -- Dow followed  
12 Bayer's price increase on TDI and polyols?

13 A No, I don't recall that.

14 Q All right. Well, if you look back at 1414 you can see on  
15 polyols --

16 MR. JOHNSON: Can we bring up Dow there, please.

17 Q -- \$.06 a pound, August 6, 2002. You see that, sir?

18 A The highlighted one, yes.

19 Q Your testimony though is that you did not discuss these  
20 price increases during your meeting with Mr. Buhse. Correct?

21 A Correct.

22 Q It's just a coincidence that Mr. Buhse drove down from  
23 Germany to meet with you that day and Dow followed Bayer's lead  
24 on that very same day. Correct? That's just a coincidence?

25 A I never knew who the guy was until I went to meet him for a

1 short lunch.

2 Q Certainly Mr. Levi knew who he was. Correct, sir?

3 A I assume Marco did.

4 Q Let's go back to something we talked about earlier, your  
5 interactions and contacts with employees of Huntsman.

6 Now, I believe you testified that during this 1999 to  
7 2004 time period Dow was not selling any product to Huntsman.  
8 Correct?

9 A I don't recall selling any product to Huntsman, no.

10 Q And we've already established that during that same 1999 to  
11 2004 period, you didn't have any discussions with Greg Geaman  
12 of Huntsman except in connection with API trade association  
13 meetings. Correct?

14 A That's where I would have met him I'm sure.

15 Q Specifically, it was after Mr. Geaman replaced Tony Hankins  
16 on the board of the API that you had some conversations with  
17 him at API meetings. Correct?

18 A If he was at the meetings there would be conversation, yes.

19 Q And I think you estimated that between 1999 and 2004, you  
20 spoke with Mr. Geaman maybe ten or 12 times at API board  
21 meetings, and that had lawyers and other board members present.  
22 Right?

23 A A big staff, yes.

24 Q And if we exclude all those API meetings, you only spoke  
25 with Mr. Geaman maybe five, six times. Correct?



1 A Did he attend the PFA meetings?

2 Someplace I would have talked to him.

3 Q Okay.

4 A I just don't know where.

5 Q Let's see if we can answer my questions first.

6 If we exclude the API meetings, you only spoke with  
7 Mr. Geaman maybe five or six times. Correct?

8 A I'm sorry, I don't remember that we had those  
9 conversations. I know who he was. I don't remember.

10 Q Let me just see if I can refresh your recollection.

11 MR. JOHNSON: Can we bring up his deposition, page  
12 298, lines 17 through 24.

13 Q (Reading) QUESTION: Let me exclude the API meetings. How  
14 many times did you believe you spoke with Mr. Geaman between  
15 1999 and 2004?

16 And you said, "Five or six times," and you said some  
17 other things there.

18 But the purposes for this question: It was five or  
19 six times. Right?

20 A Because I talked to him about the API conventions, yes.

21 Q And those communications, as you just said, were all  
22 related to the API, because you and Mr. Geaman were working  
23 together on setting up an API convention out in Salt Lake City,  
24 Utah. Right?

25 A Correct.

1 Q Now, Mr. Geaman actually replaced Mr. Hankins on the API  
2 steering committee around April 2003. Correct?

3 A I knew both the names, I don't exactly know when they  
4 replaced each other.

5 Q I'll show you PX-566. This is Huntsman's Response to  
6 Plaintiffs' Fourth Set of Interrogatories at page 14 and 15.

7 MR. STREETER: Objection.

8 Q And if you look --

9 MS. STREETER: Your Honor, can he take it down from  
10 the screen?

11 THE COURT: All right.

12 MR. JOHNSON: What's the objection?

13 MR. STREETER: Hearsay.

14 THE COURT: Yeah. Let me see the document, please.  
15 Could I see the document?

16 MR. JOHNSON: Yes, your Honor.

17 Your Honor, I was only going to refer to the page, I  
18 was not going to seek to admit it in evidence.

19 THE COURT: Okay.

20 MR. STREETER: Your Honor --

21 THE COURT: Objection overruled for now.

22 Rephrase the question and let me see -- don't put it  
23 up yet.

24 MR. JOHNSON: Okay.

25 BY MR. JOHNSON:

1 Q Huntsman in its interrogatory answers --

2 MR. STREETER: Objection, your Honor.

3 THE COURT: Well, what's the question?

4 MR. JOHNSON: I'm trying to establish when Mr. Geaman  
5 joined the steering committee for the API.

6 THE COURT: Ask him the question if he knows that, and  
7 then if he doesn't you can use that maybe to refresh his  
8 recollection.

9 BY MR. JOHNSON:

10 Q And that was my question earlier I believe: That were you  
11 aware that Mr. Geaman actually replaced Mr. Hankins on the API  
12 steering committee around April 2003?

13 A No, I don't recall that.

14 Q All right. Huntsman in its interrogatories --

15 MR. STREETER: Objection, your Honor. He's trying --

16 THE COURT: Just show him the document and ask him if  
17 whatever is in there refreshes his recollection on the date.

18 MR. JOHNSON: Can we show it --

19 THE COURT: Just hand it to him this time.

20 MR. JOHNSON: Could I have the copy back? That was  
21 his.

22 THE DEPUTY CLERK: Here it is.

23 MR. JOHNSON: Thanks.

24 THE COURT: Just point to the document and ask him if  
25 that helps refresh his recollection.

1 A When was this actually again? 2003, when?

2 I can't ask a question?

3 THE COURT: Mr. Beitel, just take a look. Read this  
4 for a moment and then...

5 Q You can just read this paragraph right here (indicating).

6 A Okay.

7 Q You need some reading glasses?

8 A No. I did leave them in my duffel bag, but I think I can  
9 read this okay.

10 Q If you do, I have an extra pair.

11 (There is a pause for the witness.)

12 (Mr. Johnson and Mr. Streeter confer off the record.)

13 Q Have you read that, sir?

14 A Just this last part here?

15 Q Yes.

16 A I just read the last paragraph, yes.

17 Q Does that refresh your recollection that Mr. Geaman  
18 actually replaced Mr. Hankins on the API steering committee  
19 around April 2003?

20 A I know the names, I didn't know exactly whether they  
21 replaced each other, no. I knew where they came from but I  
22 have no recollection of that many people on the board when  
23 transitions took place.

24 Q Well, in any event, other than API-related subjects, you  
25 did not have any communications with Mr. Geaman. Right?

1 A Not that I'm aware of.

2 Q And you never spoke with Mr. Geaman about any of the  
3 products in your purview; MDI, TDI, polyols. Right?

4 A Correct.

5 Q Now, you testified that you saw Greg Banks. He was another  
6 Huntsman guy. Right?

7 A Name recognition, yes.

8 Q And you saw him at six or seven PFA conventions. Right?

9 A If I attended a PFA conventions yes, he'd be there, yes.

10 Q And in addition, I think you recall one time when you and  
11 Mr. Banks were guests of Flexible Foam at an industry event,  
12 correct, in Las Vegas?

13 A Yes. Yes.

14 Q And you do not recall ever talking to Mr. Banks on the  
15 phone. Correct?

16 A Don't recall that at all, no.

17 Q And you never talked to Mr. Geaman or Mr. Banks about  
18 pricing of urethanes products. Correct?

19 A Correct.

20 Q Now, as you understood their roles -- and I think we  
21 already covered Mr. Geaman -- but Mr. Banks was also a  
22 counterpart to you at Huntsman with respect to the commercial  
23 sales functions similar to yours. Right?

24 A I assume that. I don't recall exactly what he was.

25 Q All right. Let's see if I can refresh your recollection.

1 Your deposition, page 74, lines 4 through 8:

2 (Reading) QUESTION: As to Bayer, who did you look to  
3 as performing functions similar to yours?

4 ANSWER: Didn't know.

5 As to Huntsman? Question.

6 ANSWER: Greg Banks or Greg Geaman.

7 Do you recall that testimony, sir?

8 A They were active in the industry, I just didn't know which  
9 one did what.

10 Q Well, you testified that they performed functions similar  
11 to yours. Right?

12 A Right.

13 Q Okay.

14 A But I don't know which one did that and which one didn't.

15 Q And, finally, you spoke to Tony Hankins of Huntsman maybe  
16 four or five times and only at API meetings. Correct?

17 A Correct.

18 Q Let's turn to PX-670.

19 THE COURT: Mr. Johnson, we'll take a break.

20 We're going to take a 15-minute break right now ladies  
21 and gentlemen. We'll see you back here at 12:30. Okay.  
22 Thanks very much.

23 (The Jury leaves the courtroom.)

24 THE COURT: We'll see you 12:30, everyone. Thanks.

25 Mr. Beitel, you can step down.

1 (Witness temporarily excused.)

2 THE COURT: We'll probably go to somewhere between  
3 1:30 and 2:00 today. Do you have much more, of Mr. Beitel?

4 MR. JOHNSON: I do.

5 THE COURT: Okay. All right. So we'll see where we  
6 are. Thanks.

7 (A recess is taken.)

8 (Proceedings resume - Jury not present.)

9 THE COURT: We'll bring out the jury.

10 MR. BERNICK: There's a question, your Honor, on  
11 timing.

12 So, Mr. Johnson --

13 THE COURT: Use the microphone. Go ahead. What is  
14 it?

15 MR. BERNICK: Mr. Johnson says that he's got an hour,  
16 maybe more. Mr. Beitel lives in Montana.

17 THE COURT: Yeah.

18 MR. BERNICK: And so we would really like to finish  
19 him today, if possible, so he doesn't have to come back for the  
20 redirect.

21 THE COURT: I have a -- I'll do my best.

22 MR. BERNICK: Okay.

23 THE COURT: But I have a commitment that I have to be  
24 out of here by no later than 2:15. So let's get started and  
25 see where we are.

1 MR. BERNICK: Okay. Thank you.

2 THE COURT: That gives us an hour and 45 minutes.

3 MR. BERNICK: Yeah.

4 THE COURT: Okay.

5 We'll do our best, Mr. Bernick.

6

7 R I C H A R D L. B E I T E L, resumes, testifies further as  
8 follows.

9

10 THE DEPUTY CLERK: Please rise for the Jury.

11 (Jury present.)

12 THE COURT: Proceed, Mr. Johnson.

13 MR. JOHNSON: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. JOHNSON:

16 Q Before we broke I was referring you to PX-670. I'll  
17 represent to you this is experts from Huntsman's corporate  
18 phone records.

19 Let's turn the page 205.

20 If you see three entries from the bottom, a call from  
21 Huntsman -- you're going get this on the screen.

22 A Okay.

23 Q It would be much easier for you to see.

24 A Yeah.

25 Q Three entries from the bottom. A call from Huntsman to



1 your office line on November 19th, 2002.

2 Your office line number was 989 636-9386. Correct?

3 A Correct.

4 Q And that was your office number in Midland in 2002.

5 Correct?

6 A From my memory, that is correct, yes.

7 MR. JOHNSON: Move the admission of PX-670.

8 THE COURT: Without objection, it's admitted.

9 Q According to Huntsman's records, someone at Huntsman placed  
10 a call to you on 11/19 at 10:14 a.m. Correct?

11 A That's what it says.

12 Q And that call lasted about one minute. Right?

13 A Oh, okay.

14 Q That's what it says right there. 1:06. You see that?

15 A At one time I thought it was one hour six minutes, I'm  
16 sorry. I didn't...

17 Q Do you remember who spoke to at Huntsman?

18 A No, I don't recall.

19 Q Do you remember what you discussed?

20 A When again was the convention out in Salt Lake?

21 Q That was in 2003.

22 A So I was chairman of the steering committee of the Alliance  
23 board, Alliance Industry board, I was chairman of that steering  
24 committee, so Huntsman was setting up a little bit to have  
25 their convention in Salt Lake.

1 Q I'm told it was October 2002, that convention in Salt Lake.

2 A That convention in Salt Lake?

3 Q Let's turn to page 207 of PX-670. You see the fourth entry  
4 from the top there? Another call from Huntsman to your office  
5 line in Midland on November 19th, 2002 at 10:36 a.m. Correct?

6 A Correct.

7 Q This is another call from Huntsman to you about 20 minutes  
8 after the phone call we just talked about. Right?

9 A Correct.

10 Q This second call lasted only about -- looks like 18  
11 seconds. Right?

12 A Correct.

13 Q Do you remember who called from you Huntsman or what the  
14 call was about?

15 A No idea, no.

16 Q Okay. Let's turn back now to page 192.

17 You see about midway down the third down the page that  
18 someone at Huntsman placed a third call to your office that  
19 same day, November 19th, at 2:41 p.m. That's your number.  
20 Right?

21 A Correct.

22 Q And that third call lasted one minute. Correct?

23 A Correct.

24 Q So according to Huntsman's phone records, somebody at  
25 Huntsman called you three times on November 19th, 2002.

1 Correct?

2 A That's what the record shows.

3 Q Now, you see a few entries down from that call to you,  
4 someone at Huntsman had a 48-second call at 2:43 p.m. to a  
5 number in Wyandotte, Michigan. Do you see that, sir?

6 A Yes.

7 Q Do you recognize that number, 734 552-9998?

8 A No, I don't.

9 Q I'm going to refer you to page 18, and I'll just show the  
10 page 18 on PX-533 which is interrogatory responses that were  
11 produced in this litigation from BASF.

12 MR. STREETER: Objection, your Honor, putting that up  
13 on the screen. It's hearsay.

14 MR. JOHNSON: I'm trying to do this quickly. I can  
15 show it to him if you prefer.

16 THE COURT: Okay. Mr. Streeter, do you prefer that he  
17 do it by showing it to him first?

18 MR. STREETER: I would, yes. It's not a document that  
19 should come into evidence.

20 MR. JOHNSON: I'm not offering it into evidence. It's  
21 interrogatory answers.

22 THE COURT: I'll allow it then, go ahead.

23 MR. JOHNSON: Okay.

24 THE COURT: In the interest of saving some time, I'll  
25 allow it.

1                   Let's go.

2                   MR. JOHNSON: Thank you, your Honor.

3 BY MR. JOHNSON:

4 Q So this is BASF's interrogatory answers. And you'll see  
5 there they've got the phone numbers for the people at BASF,  
6 including Mr. Berkowski. You see that, sir?

7 A I see Berkowski's number.

8 Q His cell phone number, sir. Do you see it?

9 A I see it, yes.

10 Q 734 552-9998. Right?

11 A Correct.

12 Q Okay. So it appears that one minute after someone at  
13 Huntsman contacted you, someone at Huntsman called Mr.  
14 Berkowski's cell phone. Correct?

15 A Somebody called his cell phone, yes.

16 Q And you know Larry Berkowski, don't you, sir?

17 A Not well. My recognition is I'm more with Bill Bernstein.

18 Q Yeah. He was the director of BASF's polyurethanes business  
19 at this time. Correct, sir?

20 A Well, he was the guy I was replacing on the board of the  
21 Alliance Polyurethane Industry, that's where I met him.

22 Q And he was the director of BASF's urethanes business at  
23 this time, correct, sir?

24 A The total business? I wasn't aware of that.

25 Q I think you testified previously about one time you

1 interacted with him at an API convention. Right?

2 A With Berkowski?

3 It's a name that pops up. I just don't remember with  
4 a convention back there 12 years ago I interfaced with him.

5 Q When you spoke to someone at Huntsman on November 19th,  
6 2002, did your Huntsman contact tell you that he or she was  
7 going to call Mr. Berkowski immediately after speaking with  
8 you?

9 A No recollection of that.

10 Q Please turn to the next page, 194, of PX-670.

11 A little more than halfway down the page do you see a  
12 call to Pittsburgh, Pennsylvania?

13 A Yes.

14 Q Do you recognize that number, sir, 412 777-7601?

15 A No, I don't.

16 Q If you turn briefly to PX-646. This is an email that was  
17 produced from Bayer's files. And if you look down at the  
18 bottom, you'll see Jerry Phelan of Bayer Corp., and his number  
19 is 412 777-7601. Do you see that, sir?

20 A Yes.

21 Q And that's the same number we see in the phone records of  
22 Huntsman on 11/19/2002 at 3:25 p.m. Correct?

23 A Yes, I guess so.

24 MR. JOHNSON: Move the admission of PX-646.

25 MR. STREETER: No objection.

1 THE COURT: It's in evidence then.

2 Q Are you aware that Gary Phelan was a Bayer salesman for MDI  
3 and polyols?

4 A No recollection of that name, no.

5 Q So let's recap here. Someone at Huntsman contacted you  
6 three times on November 19th, 2002; someone at Huntsman called  
7 Mr. Berkowski at BASF on his cell phone one minute after the  
8 third phone call with you; and someone from Huntsman called  
9 Jerry Phelan, a Bayer salesman for MDI 40 minutes later. Have  
10 I got that about right?

11 A I guess so.

12 Q Do you recall that BASF announced a price increase on MDI  
13 that same day?

14 A No, I don't. What day was it again?

15 Q November 19th, 2002.

16 Let's turn to PX-1093.

17 Do you see that this is a price announcement letter  
18 from BASF to Mr. Frank Hurst of the Carpenter Company?

19 A Yes.

20 Q And this letter is dated November 19th, 2002. Correct?

21 A Correct.

22 Q This letter is signed by Lawrence A Berkowski, Director of  
23 Urethane Chemicals for BASF. Correct?

24 A Yes.

25 Q That's the same BASF employee who someone at Huntsman

1 called right after they called you on the same day on November  
2 19th, 2002. Correct?

3 A That's what it listed on the schedule. I don't remember  
4 talking to him, so...

5 Q BASF's announcement is for \$.06 on MDI. Right?

6 A Correct.

7 MR. JOHNSON: Move the admission of PX-1093.

8 MR. STREETER: No objection.

9 THE COURT: It's in evidence.

10 Q Do you recall that three days later Dow announced an  
11 identical MDI increase?

12 A No, I don't recall.

13 Q Let's take a look at PX-1085. Do you see that this is a  
14 price increase announcement from Dow to Carpenter Company?

15 A Frank Hurst at Carpenter, yes.

16 Q That's your signature. Right?

17 A Yes.

18 Q And the letter is dated November 22, 2002. That's three  
19 days after BASF's letter. Correct?

20 A Their letter was on the 19th?

21 Q Yes.

22 A Three days later, yes.

23 Q And Dow's announcement is also for \$.06 for MDI, which is  
24 the same amount that BASF announced. Correct, sir?

25 A I see the six-cent a pound increase for tank cars, yes.

1 MR. JOHNSON: Move the admission of PX-1085.

2 MR. STREETER: No objection.

3 THE COURT: It's in evidence.

4 Q Let's turn to PX-662. This is a series of emails that was  
5 produced in the file of Huntsman dated November 25th and 26th,  
6 2002. Now that's three or four days after Dow's announcement  
7 letter went out. Correct?

8 A What day was this again? November --

9 Q This is emails from November 25th and 26th.

10 MR. STREETER: Your Honor --

11 Q Your letter was November 22.

12 MR. STREETER: -- objection.

13 THE COURT: What's the objection?

14 MR. STREETER: I'm going to ask that the document be  
15 taken down unless there's some foundation laid.

16 MR. JOHNSON: Your Honor, this is cross-examination of  
17 this witness.

18 MR. STREETER: He's cross-examining a witness on a  
19 document from another company. We object.

20 THE COURT: What's the question first, Mr. Johnson?  
21 You're going to show him the document?

22 MR. JOHNSON: I'm going to talk to him about what it  
23 says and what the time stamps reflect with respect to the  
24 timing of these events around this price increase.

25 THE COURT: Go ahead, let me hear the question.



1 BY MR. JOHNSON:

2 Q I think I asked the question, that these emails were three  
3 or four days after Dow's announcement letter went out.

4 Correct?

5 A Correct I guess.

6 Q Well, Dow's announcement was November 22?

7 A Okay.

8 Q These emails are November 25th and 26th. Okay?

9 A Three days later, yes.

10 Q Now, if you look at the bottom --

11 MR. JOHNSON: I put up the email again?

12 Q On the second page --

13 MR. STREETER: No, I object.

14 THE COURT: I'll allow it for now, I'll allow it. Go  
15 ahead.

16 Q This is a page from Larry Winger to a number of Huntsman  
17 employees, and the subject line is: "Americas ridged price  
18 increase." Do you see that sir?

19 A Yes.

20 Q And it says, quote: The Americas Ridged Team wish a price  
21 increase seeking \$.06 a proud, and they have their trade names  
22 for MDI. Right?

23 You recognize those? Rubanate, JEFFOL and Rubitherm?

24 A Just the Rubanate.

25 Q That's MDI. Right?

1 A I recognize Rubanate is there.

2 MR. STREETER: Judge, could we have a sidebar?

3 When I was examining him he wasn't even allowed to  
4 testify about a Dow document that he was cc'd on --

5 THE COURT: Okay.

6 MR. STREETER: -- that he didn't remember.

7 MR. JOHNSON: Your Honor, this is cross --

8 MR. STREETER: This is another company's document --

9 THE COURT: I'll here you at sidebar.

10 (At the sidebar.)

11 THE COURT: Okay, go ahead.

12 MR. JOHNSON: So this is a letter which immediately  
13 follows the increase by Dow that was produced from Huntsman  
14 internally talking about the same identical price increase on  
15 MDI. And the document indicates obviously what was going on  
16 within Huntsman and the time stamps of various emails within  
17 this document, including Ms. Alonis' (phonetic) email that was  
18 sent at 2:00 p.m.

19 I am going to establish that immediately after this  
20 email, some of these emails were sent, there were further phone  
21 calls to Berkowski, Phelan and Beitel during this time period  
22 that appeared to follow immediately after this internal  
23 communication in Huntsman about what they were doing with the  
24 price increase.

25 THE COURT: Go ahead, let me hear you, Mr. Streeter.

1 MR. STREETER: Your Honor, when I was questioning  
2 him --

3 THE COURT: Don't tell me what you did. We don't have  
4 to time to go back to what happened there.

5 MR. STREETER: It's not a Dow document. The witness  
6 isn't on it. He has no recollection of it. It's 11 years ago.

7 THE COURT: Mr. Johnson, he's not anywhere on this  
8 document. He's not a cc, it's not his document, it's not his  
9 company's document. Correct?

10 MR. JOHNSON: That's correct.

11 THE COURT: All right. Yeah. No, so first of all  
12 you're not going to move this into evidence, not through him.  
13 All right?

14 MR. JOHNSON: It's pre-admitted, your Honor, it's a  
15 business record. It's authentic.

16 THE COURT: It may be but --

17 MR. JOHNSON: We certainly having been proceeding on  
18 that way in the past, we've been allowed to put in exhibits  
19 like this that are business records and have been agreed to be  
20 pre-admitted.

21 MR. STREETER: The pre-admission rule was subject to a  
22 witness being on the stand who could sponsor the document.  
23 This witness cannot sponsor the document.

24 THE COURT: Is anybody from Huntsman going to testify?

25 MR. JOHNSON: Well, Huntsman has already testified.

1 Mr. Geaman has testified, Mr. Hankins has testified.

2 THE COURT: Yeah.

3 MR. JOHNSON: Lots of people have testified.

4 THE COURT: I know, and this document wasn't used.

5 MR. JOHNSON: And it says in here -- it absolutely  
6 says that they can rest assured they will succeed.

7 And my point is that they could rest assured that they  
8 will succeed, that's what it says, because they had all talked  
9 to each other about these price increases, and I'm going to  
10 establish that through this examination.

11 MR. STREETER: Your Honor --

12 MR. JOHNSON: And this is cross-examination. I should  
13 be permitted to do that. This is -- this is --

14 THE COURT: No.

15 MR. JOHNSON: -- on point. This guy testified --

16 THE COURT: You could ask him things that are in here,  
17 okay --

18 MR. JOHNSON: Yes.

19 THE COURT: -- by way of a cross-examination question.  
20 But not by reference -- you can ask him: Is he aware of this;  
21 is he aware of that, things like that without referring to the  
22 document itself.

23 MR. STREETER: Your Honor, can I --

24 THE COURT: Depending on the question you ask I'll  
25 decide if I should sustain the objection or not.

1 MR. STREETER: A clarification. I think that that's  
2 going the lead Mr. Johnson to go in there and read from the  
3 document which the jury has just heard about but it's been  
4 taken down off the screen. He's going to read from the  
5 document. That should not be allowed.

6 THE COURT: I'm allowing him -- it depends. Let me  
7 hear how you phrase the question, without waving this in front  
8 of the jury.

9 MR. JOHNSON: Okay. I'm not waving.

10 THE COURT: No, without, waving it or showing it and  
11 let me see.

12 MR. JOHNSON: Yes.

13 THE COURT: If you want to get into the subject  
14 matters in here: Is he aware? Does he know? Does he know  
15 that Huntsman believed that this was going to happen?

16 MR. JOHNSON: Yes.

17 THE COURT: Then I'll allow it.

18 MR. JOHNSON: Okay.

19 THE COURT: That's proper cross-examination.

20 MR. BERNICK: I'm sorry, your Honor. Your Honor?

21 THE COURT: What was that?

22 MR. BERNICK: Just a second, if I could.

23 The question of examining witnesses with respect to  
24 matters that are not in evidence goes all the way back to Wood.  
25 And Wood was asked a whole bunch of questions on

1 cross-examination that relate to Schefsky, related to other  
2 people who hadn't even testified.

3 When I stood up on redirect examination I was not  
4 permitted to show the witness anything that related to those  
5 people.

6 THE COURT: I'm not allowing him to show this.

7 MR. BERNICK: But it is exactly the same thing to the  
8 jury. It all even has to do -- they know exactly what's going  
9 on.

10 THE COURT: No, they don't. You think they know  
11 exactly what's going on with that document and they're going to  
12 remember that document?

13 MR. BERNICK: Your Honor, your Honor --

14 THE COURT: Look --

15 MR. BERNICK: -- it is obvious that --

16 THE COURT: Off the record for a second.

17 (Off the record discussion.)

18 THE COURT: I'll hear the questions. Don't start  
19 reading from that. Put it on your dais and just ask: Is he  
20 aware of this; is he aware of that, and I'll allow it depending  
21 on what the question is and how it's phrased. I'll consider  
22 it.

23 MR. JOHNSON: Thank you, your Honor.

24 THE COURT: Okay.

25 (In open court.)

1 THE COURT: All right. Mr. Johnson, you can proceed.

2 MR. JOHNSON: Sure.

3 BY MR. JOHNSON:

4 Q Mr. Beitel, were you aware --

5 BY MR. JOHNSON: Take that down, please.

6 Q Were you aware that Huntsman, in fact, was preparing to  
7 follow the MDI increase announced by Dow?

8 A No.

9 Q Were you aware that Mr. -- that that letter was due to be  
10 mailed to all the market segments for Huntsman on Wednesday of  
11 that week?

12 A No.

13 Q Let's turn back to Huntsman's phone records at PX-670.

14 MR. JOHNSON: Turn to page 291.

15 Q Can you see about a third of the way down the page another  
16 call from someone at Huntsman to Larry Berkowski's cell phone  
17 number, 734 552-9998 in Wyandotte, Michigan on November 25th,  
18 '02 at 2:06 p.m.? You see that, sir?

19 A Yes.

20 Q That call lasted one minute, 18 seconds. This was a phone  
21 call from someone at Huntsman at the same time that Huntsman  
22 was getting ready to issue its price increase letter. Were you  
23 aware of that, sir?

24 A No.

25 Q If you flip to page 293, the first entry at the top of the

1 page, do you see at 2:36 p.m. the same day, about 30 minutes  
2 later, another call from Huntsman to Jerry Phelan of Bayer, 412  
3 777-7601, the same number as above. Do you see that, sir?

4 A I see the numbers, yes.

5 Q Were you aware that Mr. Geaman was assuring his people at  
6 Huntsman --

7 MR. STREETER: Objection, your Honor, exactly what we  
8 discussed.

9 THE COURT: Let me hear the question. He hasn't even  
10 finished it.

11 Q Were you aware that Mr. Geaman at Huntsman was assuring his  
12 salespeople that they would succeed with this price increase  
13 announcement?

14 A No, not aware.

15 Q Let's turn to PX-369. Do you see this is a letter from  
16 Huntsman dated November 29th, 2002, announcing a price increase  
17 for MDI, polyols and systems. Do you see that, sir?

18 A Yes.

19 Q And like BASF's and Dow's price increases, Huntsman's is  
20 also for \$.06 effective January 1, 2003. Correct?

21 A Yes.

22 MR. JOHNSON: Move the admission of PX-369.

23 MR. STREETER: No objection.

24 THE COURT: It's in evidence.

25 Q Your testimony though is that you did not discuss this



1 price increase with Mr. Banks, Mr. Geaman, or anyone else at  
2 Huntsman?

3 A Correct.

4 Q Your three phone calls with Huntsman on November 19th,  
5 2002, were totally unrelated to these price announcements and  
6 the timing is just a coincidence. Right?

7 A Don't even remember the calls.

8 Q Do you recall that your friend, Mr. Bernstein, that you got  
9 together for drinks with him in December of 2002?

10 A I knew him. I didn't -- December 2nd, 2002?

11 Q Yes. December 2002.

12 A Yeah.

13 No, I'm not aware that I had drinks with him. Where  
14 was that?

15 Q Let's take a look at PX-93.

16 Do you see on page 1 of Mr. Bernstein's expense report  
17 there's an entry dated 12/22/02, reflecting that Mr. Bernstein  
18 had cocktails with you. Do you see that, sir?

19 A Yes.

20 MR. STREETER: Oh, the same objection, your Honor.

21 THE COURT: This is pre-admitted or not?

22 MR. JOHNSON: Pre-admitted, your Honor.

23 MR. STREETER: Is it in evidence?

24 THE COURT: No. You know, that's one of the problems.

25 Well, it will take more time.

1                   Show him the document rather than showing it on the  
2 screen.

3                   MR. JOHNSON: Your Honor, his name is on this  
4 document.

5                   THE COURT: Okay.

6                   MR. JOHNSON: I mean, how can I not be able to show  
7 him this?

8                   THE COURT: You can. We're using the video. And  
9 typically you would just show it to him first and ask him,  
10 and --

11                  MR. STREETER: Can that it be taken down until the  
12 objection is resolved?

13                  THE COURT: We'll take all the time in the world.

14                  Go ahead, if you're objecting to that. If his name is  
15 on it, go ahead.

16                  Mr. Johnson, show him the document, ask him if he  
17 recognizes it, is his name on there, and then they'll be no  
18 objection and then it will go into evidence and then the jury  
19 can see it.

20                  MR. JOHNSON: Thank you.

21 BY MR. JOHNSON:

22 Q This is PX-93. You see on the first page there -- and once  
23 again you can probably see it better on the screen.

24                  MR. JOHNSON: He can't read very well without his  
25 glasses.

1 THE COURT: Somebody, give him a set of glasses, you  
2 know?

3 MR. JOHNSON: I have an extra pair. I'll get them.

4 MR. STREETER: Judge, just to move this along --

5 THE COURT: No. If you have an objection, I'll  
6 recognize it. I know what you're saying. I know what you're  
7 saying. But if, ultimately, if his name is on this document,  
8 unlike something else --

9 MR. STREETER: It's another company's document.

10 THE COURT: Okay. I don't know what the -- you know,  
11 counsel represented his name is on there as a cc?

12 MR. STREETER: No.

13 MR. JOHNSON: It's an expense report, it shows that he  
14 had drinks with Mr. Bernstein.

15 A Is this the \$6.00 we had drinks?

16 Q Try that (handing eyeglasses).

17 THE COURT: Ask him if it refreshes his recollection  
18 then if he had drinks with Mr. Bernstein at a certain day.

19 Q Does that help?

20 MR. STREETER: That's all I'm asking for, your Honor,  
21 is that he do it the way the rules say.

22 A Okay. So we had --

23 THE COURT: You know, Mr. Streeter, I know how the  
24 rules require it, but we were trying to move this along this  
25 afternoon for reasons that we have that we all know about. But

1 if you insist, I'll apply the rules strictly.

2 Objection sustained.

3 Show him the document. And then ask the proper  
4 question.

5 Q So this is the expense report for Mr. Bernstein. Does it  
6 reflect at the bottom of the page your name as having a drink  
7 with Mr. Bernstein?

8 A Yes.

9 Q Thank you.

10 MR. JOHNSON: Move the admission --

11 THE COURT: Do you have an objection?

12 MR. JOHNSON: -- of PX-93.

13 THE COURT: No, if you do -- do you have --

14 MR. STREETER: No, I don't have an objection, your  
15 Honor.

16 THE COURT: All right. I'll listen to your objection  
17 if you have it.

18 MR. STREETER: My objection is that that's not the  
19 proper way to refresh a witness' recollection. You put the  
20 document in front of them and you ask them whether it refreshes  
21 their recollection, you don't get to read from it. That's my  
22 objection, and Mr. Johnson knows it.

23 THE COURT: All right. We heard your objection.

24 BY MR. JOHNSON:

25 Q The business purpose that Mr. Bernstein indicated here was

1 "customer relations."

2 Do you see that, sir?

3 A I see it here, yes.

4 Q Now, isn't it true, sir, that when you met with Mr.  
5 Bernstein, Dow and its competitors had just announced price  
6 increases for urethane products to become effective January  
7 1st, 2003?

8 A Yes.

9 Q If you turn the PX-1414 at pages 16 through 17.

10 Do you see starting there near the bottom of page 16  
11 of the summary through the middle of page 17, that BASF, Bayer,  
12 Dow, Huntsman all announced price increases for MDI; and Bayer,  
13 Dow and Huntsman announced price increases for polyols in late  
14 November of 2002? Do you see that, sir?

15 A MDI, polyol.

16 Q Yes, sir.

17 A Yep.

18 Q And all of those announcements were made within a few days  
19 during the last week of November. Correct?

20 A 22nd, yeah --

21 Q And all of the announcements?

22 A -- and 19 --

23 Q I'm sorry?

24 A I'm sorry. I didn't see the 19th. So it was the 19th,  
25 22nd, 27th, 29th. Okay.

1 Q And all the announcements were \$.06 a pound. Correct?

2 A Both were TDI -- yes.

3 Q And all the announcements became effective January 1, 2003?

4 A BASF -- did BASF also do the polyols?

5 Q No, I didn't say that. I said Bayer, Dow and Huntsman  
6 announced price increases for policies.

7 A Okay. I was looking at -- okay. I was looking at the BASF  
8 number. I'm sorry.

9 Q All of the announcements became effective January 1, 2003?

10 THE COURT: Can you hear?

11 They're having a hard time hearing you, so please --

12 THE WITNESS: I'm sorry.

13 THE COURT: -- again, try to keep your voice up.

14 THE WITNESS: Can I move this over closer so I can see  
15 the screen?

16 THE COURT: Use the microphone, please.

17 THE WITNESS: Sorry.

18 A Pardon. Ask the question again, please.

19 Q All the announcements became effective January 1st, 2003?

20 A Correct.

21 Q Isn't it true that you and Mr. Bernstein met for cocktails  
22 specifically so that you could discuss this price increase  
23 initiative?

24 A No.

25 MR. JOHNSON: Your Honor, I just want to clarify:

1 PX-93 is admitted?

2 THE COURT: Is there any objection?

3 MR. STREETER: No objection.

4 THE COURT: All right. Then it's in evidence.

5 Q Okay. Let's move forward.

6 Do you recall that Dow and its competitors announced  
7 another round of price increases in late February 2003 to  
8 become effective April 1, 2003?

9 A I don't recall, but it seems possible because we were  
10 trying to recover --

11 Q This was a period when demand was weak and Dow predicted  
12 that it would be difficult to get prices up. Correct?

13 A 2001 and 2002 were difficult times, margins had dropped.  
14 Yes, we were trying get our prices up.

15 Q Okay. We're talking about late February 2003 here, sir.

16 A Right.

17 Q Do you recall this was a period when demand was weak and  
18 Dow predicted that it would be difficult to get prices up?

19 A We were making a move to get our prices up.

20 Q Let's turn to PX-271.

21 This is a presentation by David Fischer, an Investor  
22 Relations Review, dated January 20th, 2003. That would be a  
23 presentation made by your boss, David Fischer. Correct?

24 A Correct.

25 Q If you turn to Slide 10, at the top bullet point Mr.

1 Fischer wrote, quote, "Overall demand is weak."

2 Is that consistent with your recollection of market  
3 conditions in early 2003?

4 A In '1 and '2 it was weak in that period of time, yes.

5 Q And on the next slide, page 11, Mr. Fischer wrote: "Bayer,  
6 BASF seems to be supporting price increases in the market;  
7 Huntsman is supporting MDI increase in North America. Quiet  
8 elsewhere."

9 Do you see that, sir?

10 A Correct.

11 Q And finally on page -- on Slide 13 under, "Specific Issues"  
12 Mr. Fischer wrote, quote: Price increases very difficult in  
13 environment of weak demand, closed quote.

14 Is that consistent with your recollection, sir, of  
15 this time period?

16 A 2001, 2002. 2003 the market turned around though.

17 Q This was --

18 A This was early --

19 Q This presentation was in January of 2003. Do you recall  
20 that that was the condition of the market in January of 2003?

21 A The market going into 2003 was weak.

22 MR. JOHNSON: I move the admission of PX-271.

23 MR. STREETER: No objection.

24 THE COURT: It's in evidence then.

25 Q Do you agree that it was very difficult to increase prices



1 in periods of week demand?

2 A Yes.

3 Q Isn't it true, however, that the industry announced price  
4 increases the very next month?

5 A Sometimes price increases were generated to try to get the  
6 price to move up, but also stop it from going down.

7 Q Yes. That was one reason you sent out price increases,  
8 wasn't it, sir, to stop prices from going down?

9 A But you also tried to recover what has been going away.

10 Q Just answer my questions, sir: That was one of the reasons  
11 for price increases, right, to prevent the price from going  
12 down further?

13 A No, to recover losing margins you've had on the previous  
14 products.

15 Q I had a different question, sir.

16 A Okay.

17 Q Price increases were issued in order to prevent the prices  
18 from falling further. Right?

19 A Not -- not really. 2003 is when we turned the market  
20 around.

21 Q Let's turn back to PX-1414, which is the summary of price  
22 increase announcements. If you turn to page 18 and 19 of  
23 PX-1414, do you see that on February 21st, 2003, Bayer  
24 announced price increases for MDI and polyols?

25 A Bayer, MDI polyols. Looks like February 21st and February

1 27th.

2 Q And that was in the amount of 6 to \$.08 per pound.

3 Correct, sir?

4 A Yeah, some were six and some were eight.

5 Q And Bayer's increase had an effective date of April 1,  
6 2003. Correct?

7 A Correct.

8 Q And do you see in the days following, that Dow, BASF,  
9 Lyondell and Huntsman all announced similar increases in the  
10 range of 6 to \$.08 per pound for MDI and polyols, and all five  
11 companies announced price increases of \$.10 a pound for TDI?  
12 Do you see that, sir?

13 A I don't see the TDI, but...

14 Q Todd would be glad to show it to you.

15 A I see the \$.10 on TDI, yes.

16 Q And that was for \$.10 a pound. Right?

17 A Correct.

18 THE COURT: Mr. Beitel, please try to speak into the  
19 microphone and keep your voice up. Your voice drops and I  
20 think --

21 THE WITNESS: Okay. Sorry.

22 THE COURT: All right.

23 Q Did you speak with your contact at Huntsman about these  
24 price increase announcements for MDI and polyols?

25 A No, I did not.

1 Q Let's turn to PX-668 and look at page -- this is Huntsman  
2 phone records again. And look at page 96.

3 Do you see on March 7, 2003 down at the bottom at  
4 11:36 a.m. we have another call from someone at Huntsman to  
5 your office lasting 18 seconds? Right?

6 A Yes.

7 Q Let's turn now back to page 80 of the same exhibit. Do you  
8 see that same afternoon at 1:59 p.m., a one-minute call from  
9 someone at Huntsman to Mr. Berkowski's cell phone number? You  
10 see that there, Wyandotte, Michigan?

11 A Yes.

12 Q And then do you see that one minute later someone at  
13 Huntsman placed another call to you at 2:01 p.m.?

14 Do you see that, sir?

15 A Yes.

16 Q And that call to you lasted just under two minutes.  
17 Correct?

18 A Yes.

19 Q Did your Huntsman contact tell you that he had just gotten  
20 off the phone with Mr. Berkowski?

21 A I have no recollection of the telephone call.

22 Q Did your Huntsman contact tell that you BASF and Huntsman  
23 planned to support the price increases?

24 A No recollection of the call.

25 Q So is it just a coincidence that someone at Huntsman called

1 Mr. Berkowski and then called you back-to-back on March 7th,  
2 2003?

3 A One of the problems is that Teri Clements, my secretary,  
4 answered the phones at times. So I don't remember the call and  
5 it could have been talking to my secretary.

6 Q Well, let's turn to page 84 of PX-668. Do you see the  
7 fifth line down, another call, one-minute call from Huntsman at  
8 3:25 to a number in Wyandotte, Michigan?

9 A Yes.

10 Q That's Mr. Berkowski's office telephone number. Do you  
11 recognize it, sir?

12 A No.

13 MR. JOHNSON: I need to see PX-533 and I'll need to  
14 show it to the witness.

15 Oh, he still has it.

16 Q Apparently you still have it. PX-533.

17 MR. JOHNSON: Woodbridge.

18 That had the phone numbers on it.

19 A Here's PX-533 here.

20 Q And you see on page 18, Mr. Berkowski's office telephone  
21 number for 2001 to 2005, 737 324-5484. Do you see that, sir?

22 A Yes, I see it.

23 Q So to recap again: Someone at Huntsman calls you at 11:36  
24 a.m. on March 7; then Mr. Berkowski of BASF at 1:59 p.m.; then  
25 you again on 2:01; and then Mr. Berkowski again at 3:25.

1 Have I got that right, sir?

2 A I guess.

3 MR. JOHNSON: Move the admission of PX-668.

4 THE COURT: Without objection --

5 MR. STREETER: No objection.

6 THE COURT: It's admitted.

7 Q Okay. Let's move forward again.

8 Do you recall that Dow and its competitors announced  
9 another round of price increases later that year for MDI and  
10 polyols with effective dates of October 1st, 2003?

11 A I don't recall.

12 Q Okay. If you'll turn back to PX-1414 to pages 20 and 21.  
13 Here's a hard copy of PX-1414 if that would help. I know  
14 you've got some glasses now so if its easier for you to see on  
15 there (handing document).

16 So do you see on pages 20 and 21 that Dow and all of  
17 its competitors announced another round of price increases for  
18 MDI and polyols with effective dates of October 1st, 2003?

19 A MDI, then polyols?

20 Q Yes.

21 A Yes, I see them.

22 Q And do you see that Dow and its competitors issued those  
23 price increases in late August and early September 2003?

24 Correct?

25 A Correct.

1 Q And Dow led both those price increases. Correct?

2 A For the MDI and polyol?

3 Q Yes.

4 A Yes.

5 Q And you testified that Dow typically led polyol increases  
6 in particular because Dow was the biggest player in polyols and  
7 was backward-integrated on that product. Correct?

8 A To the propylene oxide, yes.

9 Q And, yes, you were referring to the fact that Dow  
10 manufactured propylene oxide, which is a precursor to polyols.  
11 Correct?

12 A That's what you make polyols out of, yes.

13 Q Let's turn to PX-1089. Do you recognize this as a price  
14 announcement from you on behalf of Dow to Carpenter, dated  
15 August 25th, 2003?

16 A Correct.

17 Q The increase was \$.06 on MDI. Correct?

18 A In rail car shipments, yes.

19 MR. JOHNSON: Move the admission of PX-1089.

20 MR. STREETER: No objection.

21 THE COURT: All right. Its in evidence.

22 Q Please turn to PX-1090.

23 Do you recognize this as a price announcement from you  
24 on behalf of Dow to Carpenter dated the same day, August 25th,  
25 '03? This was the increase of \$.06 on polyols. Correct?

1 A Rail car shipments, yes.

2 MR. JOHNSON: Move the admission of PX-1090.

3 MR. STREETER: No objection.

4 THE COURT: All right. It's admitted.

5 Q Now, in this particular instance, Huntsman and BASF hadn't  
6 announced yet. Right? At the time of your letter, August  
7 25th, 2003, Huntsman and BASF had not announced yet.

8 You can look back at PX-1414.

9 A What page again?

10 Q Pages 20 and 21 I believe.

11 Huntsman announced on August 29th, '03 --

12 A What --

13 Q -- and BASF announced on August 28th, 2003. Do you see  
14 that, sir?

15 A Is this the polyol? Is this the polyol here?

16 Q Polyol and MDI.

17 A What page? I'm looking at -- this shows an announcement  
18 date was 12/6. Do I have the wrong one?

19 Okay. I'm sorry. I had the wrong one.

20 Q Have you got it?

21 A It's on the screen so I can see it now, yes.

22 Q Okay?

23 A Okay.

24 Q All right. So let me see here.

25 So the question was: In this particular instance, at

1 the time you sent out your letters to Carpenter on August 25th  
2 announcing these price increases, Huntsman and BASF hadn't  
3 announced yet. Right?

4 A Correct.

5 Q Okay. And Huntsman you saw announced on 8/29/03, and BASF  
6 announced on 8/28/03. Right?

7 A Correct.

8 Q And your letter had gone out on August 25th. Right?

9 A Correct.

10 Q Now, do you recall that the very next day, August 26th,  
11 which was prior to Huntsman's decision to follow Dow's  
12 announcement, that you had multiple phone calls with someone at  
13 Huntsman?

14 A I don't recall that, no.

15 Q Okay. Let's turn to PX-666.

16 Page 269, another set of phone records from Huntsman.

17 A On the last one, who was that letter to?

18 Q Frank Hurst, I believe.

19 A Okay.

20 Q Okay.

21 Yes, Frank Hurst at Carpenter. Okay?

22 A As -- I mentioned before, you call the customer before you  
23 sent the letter.

24 Q Please move to PX-666, page 269.

25 Let's start first with a call from Huntsman to Mr.



1 Berkowski from BASF at 1:31 on August 26, '03. Do you see  
2 that, sir?

3 A Yes.

4 Q 737 324-5484. We've already established that that's Mr.  
5 Berkowski's office phone. Do you see that, sir?

6 A Yes.

7 Q You see right below that a call from Huntsman to your  
8 office at 1:33 p.m., 989 636-9386? You see that, sir?

9 A Yes.

10 Q And that call lasted 1.5 minutes. Right?

11 A 1.5 minutes?

12 Q Yes.

13 A Right.

14 Q And those calls were literally on top of each other.  
15 Correct, sir?

16 A Short period afterwards awards, three minutes or two  
17 minutes, yes.

18 Q Do you see on page 274 another call to your office line  
19 later that same afternoon at 3:33 p.m.? You see that, sir?

20 A 3:30 --

21 Q 3:00 p.m.

22 A Yep.

23 Q But that one only lasted 18 seconds. Right?

24 A Yes.

25 Q I guess you were not in your office, because that call was

1 followed immediately by another call from Huntsman to your cell  
2 phone. Correct, sir?

3 A I guess that's my cell phone.

4 Q You guess, sir? Do you know that that's your cell phone?

5 A It's an old number. I have a new cell phone number and  
6 that's not it.

7 Q Okay. Well, I don't want any doubt about this.

8 A Okay.

9 MR. JOHNSON: Can I see PX-563, please.

10 A That's, you know, 13 years ago.

11 Q I understand. I appreciate that.

12 But I don't want anybody to have any doubts about  
13 this.

14 A I gave up that cell phone in 2004.

15 Q This is PX-563, it's interrogatory answers. If you would  
16 take a look at page 13.

17 Are you there yet?

18 A Yes.

19 Q Do you see that your cell phone number during this time  
20 period was 989 860-9880?

21 A Yes.

22 Q Okay. So let's turn back to the phone record again,  
23 PX-666. Do you see this call to your cell phone from someone  
24 at Huntsman lasted 26 minutes? Right?

25 A I see it now, yes.

1 Q And then if we turn to page 276, do you see that someone at  
2 Huntsman called Mr. Berkowski of BASF, again about 20 minutes,  
3 after they finished speaking with you?

4 A Yes.

5 Q So again, to recap for the jury: Dow leads a price  
6 increase; the next day someone at Huntsman called Mr. Berkowski  
7 at 1:31 p.m.; then you at 1:33 p.m.; then you again to your  
8 office line at 3:33 p.m.; and then again to your cell phone at  
9 3:33 for 26 minutes; and then Mr. Berkowski again at 4:19 p.m.

10 Have I got that right, sir?

11 A There are so many of them, I guess -- you must have them  
12 listed down right, I just can't see that many, bang, bang,  
13 bang, bang.

14 MR. JOHNSON: Move in the admission of PX-666.

15 THE COURT: No objection, it's in.

16 MR. STREETER: Which document is that?

17 Q And all of that is just a coincidence. Right?

18 MR. STREETER: Just a moment.

19 THE COURT: Just a moment, please.

20 MR. JOHNSON: Oh.

21 THE COURT: Let's hear --

22 MR. STREETER: No objection.

23 THE COURT: Okay, it's in evidence.

24 Q All that is just a coincidence. Right, sir?

25 A When was the convention? I never remember even talking to

1 these people.

2 Q Let's turn to PX-390 -- actually, let's not.

3 If we stay with Exhibit PX-666 and turn to page 295.

4 Do you see there towards the bottom of the page a call from  
5 Huntsman to Mr. Berkowski at 1:51 p.m., sir, on August 27th,  
6 2003?

7 A I see the telephone numbers, yes.

8 Q Would it surprise you to learn that someone at Huntsman  
9 called you again that very same morning?

10 A Yes.

11 Q Let's go to PX-666 at 333. There's a call from someone at  
12 Huntsman to you at 11:05 a.m., it's 21 minutes duration.

13 Do you see that, sir?

14 MR. STREETER: It's the next day, your Honor, just for  
15 the record.

16 THE COURT: All right.

17 A Yes.

18 MR. JOHNSON: I said "the very next morning," didn't  
19 I?

20 MR. STREETER: You --

21 MR. JOHNSON: Did I say "the same morning"?

22 THE COURT: The next day.

23 Q My fault if I did. I meant the very next morning, sir.

24 And you see that that phone call had a 21-minute  
25 duration. Correct?

1 A Correct.

2 Q And once again that is your cell phone. Right?

3 A You have the number, I'd have to look it up again. I'm  
4 sorry.

5 Q I'll represent to you that's your cell phone.

6 A Cell phone number, okay.

7 Q Do you recall that Huntsman announced an identical \$.06  
8 increase for MDI and polyols on the next day, August 29?

9 A No, I don't recall that.

10 Q If you look at PX-1414 again at page 21.

11 MR. JOHNSON: Can we bring up Huntsman's identical  
12 six-cent increase for MDI and polyols on 8/29.

13 Q Do you see that now, sir?

14 A Yes.

15 Q Do you recall that BASF and Bayer also announced identical  
16 six-cent increases for MDI and polyols on August 28th and  
17 September 1? Do you see that, sir? He'll bring it up for you.

18 A Yes.

19 Q You do see that?

20 A When did we announce?

21 Q You'll see it on this chart there, sir.

22 A Okay. So the chart -- those are MDI price increases there?

23 MR. JOHNSON: Can we see what the product is?

24 MR. SCHAEFER: Top line.

25 MR. JOHNSON: Oh, MDI, yes.

1 Q See at the top left?

2 A Okay, that's -- okay. I thought they'd be hooked together,  
3 they're not.

4 Q Okay. So the question was: Do you recall that BASF and  
5 Bayer also announced identical six-cent increases for MDI and  
6 polyols on 8/28 and 9/1?

7 And you've just seen that in this Exhibit 1414.  
8 Correct?

9 A I've seen the exhibits, yes.

10 Q So we have seen that you spoke to someone at Huntsman three  
11 times on August 26th, and again for 21 minutes on August 28th.  
12 Right?

13 A Yes.

14 Q And the timing of your phone calls with Huntsman relative  
15 to these price announcements, that's just a big coincidence.  
16 Right?

17 A Well, looks like we already announced the increase.

18 Q That's just a big coincidence. Is that right, sir?

19 A That we had already previously announced the increase and  
20 then there are calls afterwards?

21 I -- yeah, it's a coincidence. I don't remember even  
22 talking to Huntsman.

23 Q Now, we've been reviewing a number of phone calls between  
24 you and Huntsman and from Huntsman's corporate phone records.  
25 Now, if I'm going to get you out of here we don't have time to

1 review every -- every time Huntsman called you between 2002 and  
2 2003 while you were commercial director at Dow.

3 Would it surprise you to learn that we found 51 phone  
4 calls between you and Huntsman over that two-year period?

5 A I was working with Huntsman because they were going to  
6 handle the API convention in Salt Lake, so there was a lot of  
7 calls working, putting it together since I was chairman of the  
8 Alliance Polyurethane Industry at that time, and they wanted to  
9 make sure that the convention was held in Salt Lake.

10 Q Would it surprise you to learn that out of that 51 times  
11 you spoke on the phone with Huntsman during 2002 to '03, we  
12 found 17 separate instances when Huntsman spoke to you and then  
13 immediately called Mr. Berkowski at BASF, or vice-versa?

14 A No recollection of that, no.

15 Q Would it surprise you to learn that out of the 51 times you  
16 spoke on the phone with Huntsman, we found six separate  
17 instances in which Huntsman spoke to you; Mr. Berkowski at  
18 BASF; and Mr. Phelan of Bayer back-to-back-to-back on the same  
19 day?

20 A There would be calls to BASF. I'm surprised Bayer.  
21 Because they were trying to have the convention out there in  
22 Salt Lake, and it was up to Bill and myself to coordinate and  
23 have the convention out there in Salt Lake to have Huntsman be  
24 the lead.

25 MR. JOHNSON: Your Honor, plaintiffs tender PX-1422,

1 which is a compilation of Huntsman phone records deemed  
2 authentic business records in this case showing 51 phone calls  
3 between Huntsman and Mr. Beitel in 2002, and '03, including 17  
4 separate days when Huntsman placed back-to-back calls to Mr.  
5 Beitel and Mr. Berkowski of BASF, and on six of those days  
6 Huntsman called Mr. Phelan of Bayer as well, and we move its  
7 admission into evidence.

8 MR. STREETER: No objection.

9 THE COURT: All right. No objection, it's in evidence  
10 then.

11 Q Your testimony is that during the course of all these phone  
12 calls with Huntsman, you never discussed urethane prices. Is  
13 that right?

14 A Correct.

15 Q Any relationship, any relationship between your calls and  
16 price increase announcements is purely a coincidence. Right?

17 A If we were selling somebody some product we'd talk about  
18 the pricing, but I don't recall selling Huntsman at all.

19 Q No, you didn't recall selling Huntsman any products at all,  
20 did you, sir?

21 A No.

22 Q Because it didn't happen, did it, sir?

23 A Not that I recall, no.

24 Q Now, we've only been reviewing exclusively Huntsman's phone  
25 records. Are you aware that Dow's corporate representative



1 testified in this case that Dow produced no phone records for  
2 you or other Dow employees for the period of the conspiracy  
3 alleged in this case? Are you aware of that, sir?

4 MR. STREETER: Objection, your Honor, that's simply  
5 false.

6 MR. JOHNSON: It is what he testified, your Honor.

7 MR. STREETER: No, it isn't.

8 THE COURT: Just a moment.

9 MR. STREETER: Regardless, it's not a proper question  
10 for this witness.

11 THE COURT: I'll sustain the objection, Mr. Johnson.

12 BY MR. JOHNSON:

13 Q Based on the number of calls we've seen in Huntsman's  
14 records from Huntsman to you, do you think it's possible we'd  
15 see additional calls from you to Huntsman employees if we had  
16 copies of Dow's phone records?

17 THE COURT: Sustained.

18 MR. STREETER: Objection -- okay.

19 Q Now, when you were asked about all of your contacts with  
20 Huntsman in the course of your deposition and in the course of  
21 your testimony in February of 2013, you didn't say anything  
22 about all these calls we just reviewed, did you, sir?

23 A In reality that far long, I don't remember all those calls,  
24 and I worked with Huntsman on the convention is what I worked  
25 on them with.

1 Q You said you only spoke to Mr. Geaman five or six times and  
2 all were relating to a specific API convention in October 2002.  
3 Correct?

4 A Correct.

5 Q And the truth of the matter is that you spoke with someone  
6 at Huntsman numerous times between 2002 and 2003, and that many  
7 of those calls were at the same time as lock-step price  
8 increases by Dow and its competitors. Isn't that a fact, sir?

9 A I don't know.

10 MR. JOHNSON: Nothing further, your Honor.

11 THE COURT: All right. Mr. Streeter, some redirect?

12 MR. STREETER: Yes, your Honor.

13 REDIRECT EXAMINATION

14 BY MR. STREETER:

15 Q I want to start with the phone calls that you were asked  
16 about.

17 MR. STREETER: I'm going to ask that PX-670 be pulled  
18 up on the board. And can you blow up the first page.

19 Q Mr. Johnson asked you about phone calls between Huntsman  
20 and you in November of 2002. Right?

21 A Yes.

22 Q And I believe he asked you about one, two, three -- three  
23 phone calls between you and Huntsman in November of 2002. Is  
24 that right?

25 A I think that's the right number.

1 Q I want to pull up PX-135.

2 Wait, before we do that. Do you remember Mr. Johnson  
3 said he represented to you that -- that the convention had  
4 occurred in Salt Lake City the month before those phone calls?  
5 Do you remember that?

6 A Yes.

7 Q I want to pull up PX-135, please.

8 MR. STREETER: Can we blow up the top of that.

9 Q You at this time were the chairman of the API. Right?

10 A Correct.

11 Q And before that, you had been the vice chairman of the API.  
12 Right?

13 A Correct.

14 Q And you'd been involved in the organization for many years.  
15 Right?

16 A Correct.

17 Q And as the chairman of the API, you had responsibility to  
18 coordinate things in connection with it. Correct?

19 A Along with the API staff, yes.

20 Q And this is --

21 MR. STREETER: If we could blow up the part in the  
22 right-hand corner where it says December 3rd, all the way down  
23 that whole section.

24 Q On December 3rd, 2002, from 8:00 a.m. to 4 p.m. in  
25 Arlington, Virginia there was a meeting of the Joint

1 Steering/Management Committee of the API. Correct?

2 A Correct.

3 Q And there were people from Huntsman, many of them who were  
4 involved in the API. Right?

5 A Yes.

6 Q And this is the beginning of December just after November  
7 of the phone calls he showed you. Correct?

8 A Yes. 2002.

9 Q And there were also people from BASF involved in the API.  
10 Correct?

11 A Yes.

12 Q And there were people from Bayer involved in the API.  
13 Right?

14 A Yes.

15 Q You spent a lot of time on the API, didn't you?

16 A About four years.

17 Q But in terms of the amount of time you spent --

18 A Yes.

19 Q -- on sort of, as part of your life during those four  
20 years, did you spend a lot of time on it?

21 A Especially being the chairman and the assistant chairman,  
22 yes.

23 Q And especially getting ready for a meeting like this?

24 A And setting up conventions.

25 Q I want to move down the page. It shows you as the Chair.

1 I want to move down the page.

2 MR. STREETER: I want you to highlight -- I want you  
3 to highlight Jim Chapman from Bayer.

4 Q So he's the person from Bayer who was involved. Correct?

5 A Yes.

6 Q And then I want to go to Joe Jadlocki from Huntsman. You  
7 see that?

8 A Yes.

9 Q Another person from Huntsman who was involved in the API.  
10 Correct?

11 MR. STREETER: Go to the next page, page 4 of the  
12 document. Next page. If you could, it's page 3 of the  
13 document.

14 If you could blow up just the text of the document.

15 And can you highlight the name "Steven Oujin."

16 Q That's another person from Huntsman that was involved in  
17 the API that you were the chairman of. Right?

18 A Sorry, I don't recall his name, no.

19 Q How about there's your name at the bottom: Rick Beitel.  
20 Right?

21 A Yes.

22 Q And there are two people right above your name from  
23 Huntsman listed there as well. Right?

24 A Correct.

25 Q And in the run-up to one of these meetings --

1           MR. STREETER: Would you -- can we blow it up,  
2 please?

3 Q In the run-up to one of these meetings --

4           MR. STREETER: Can you highlight the two Huntsman  
5 names right there above Rick Beitel. And right above Rick  
6 Beitel.

7 Q In the run-up to one of these meetings you'd have a lot of  
8 conversations with people who were involved in the API to get  
9 ready for the meetings. Correct?

10 A Ready for the meetings and also make time for the  
11 conventions.

12           MR. STREETER: And can we go to the three, four --  
13 fifth page of this document.

14           If we blow up the top of that.

15 Q Do we see more names of Huntsman people on this list here?

16           Tony Hankins. Do you see that?

17 A I see Tony Hankins.

18 Q You see Joseph Jadlocki?

19 A Right.

20 Q Do you see people from Bayer on the list?

21 A Yes.

22 Q Do you see Bill Bernstein from BASF?

23 A Yes.

24           MR. STREETER: Why don't we just blow up that whole  
25 list right there.

1 Q You're the chairman of this organization. Right?

2 A Yes.

3 Q We've got Bayer; BASF; Huntsman; BASF; Bayer; Dow;

4 Huntsman; Huntsman; BASF; Bayer; Bayer; Huntsman.

5 Do you see that?

6 A Yes.

7 Q And this convention was December 3rd, right after the phone  
8 calls that Mr. Johnson asked you about. Right?

9 A I guess it was December 3rd. I don't remember the exact  
10 date.

11 Q And on page 4 of the document --

12 MR. STREETER: If you pull that up.

13 Q -- at the top of the page, "Action Items." Do you see --

14 MR. STREETER: Can we just highlight that first part  
15 where it says, Rick Beitel and W. Bernstein.

16 Q So you and Bernstein had actually worked on things in  
17 connection with this convention. Right?

18 A Yeah. He was still there, yeah.

19 Q He was the predecessor as chairman before you. Right?

20 A He was predecessor. I replaced him but --

21 Q So you would have communications with him. Correct?

22 A Sure.

23 MR. JOHNSON: Your Honor, this is terribly leading. I  
24 know we're trying to get done, but he's just leading every  
25 question.

1           THE COURT: That's okay. It might be leading but it's  
2 not of great significance. Overruled.

3           MR. STREETER: One more. Page 1, 2, 3, 4, 5, 6, 7, 8,  
4 9 -- 10 of the document. One more page. One more page.

5           Blow up the top half of the document.

6 Q And someone from Huntsman -- you're the Chair, Rick Beitel,  
7 and someone from Huntsman is on the committee right below you;  
8 Joseph Jadlocki. Right?

9 A A recognized name, yes.

10 Q Yeah.

11           And you testified when Mr. Johnson was examining you  
12 that you -- your conversations with people from Huntsman were  
13 around the API. Is that right?

14 A Yes.

15 Q I want to turn now to the questions he asked you.

16           (Mr. Streeter confers with Mr. Bernick off the  
17 record.)

18           MR. STREETER: You know what, let's go down the page.  
19 "Operational Support Groups." Can you blow that up.

20 Q It says: "Operational Support Group." You see that?

21 A Yes.

22 Q You see Larry Berkowski?

23 A Yes.

24 Q So Larry Berkowski himself, one of the people that Mr.  
25 Johnson asked about those phone calls, was actively involved in



1 the API too. Right?

2 A Yes.

3 Q And people at Huntsman would have had reason to talk to him  
4 about that. Right?

5 MR. JOHNSON: Objection. Leading.

6 THE COURT: It's leading, but try and rephrase it, Mr.  
7 Streeter.

8 Q Do you know one way or the other whether or not people  
9 involved in this organization would have had reason to talk to  
10 each other in advance of a meeting like this?

11 A You'd be setting up to have conferences there on top of  
12 that. Plus, in a particular case with this one, Huntsman was  
13 taking the lead on the convention.

14 Q So they would have had reason to talk to participants in  
15 the convention?

16 A Right, and for the activities in the convention and the  
17 speakers.

18 Q All right. I want to move now to March of 2003. Mr.  
19 Johnson asked you some questions about phone calls in March of  
20 2003.

21 And I believe he asked you about one, two, three,  
22 four -- five phone calls involving Huntsman, you, and  
23 Berkowski.

24 (Mr. Streeter confers with Mr. Bernick off the  
25 record.)

1 MR. STREETER: You might as well highlight "Conference  
2 Planning" on that.

3 Q That's the thing you just referred to.

4 A Okay.

5 Q Is that right?

6 Is that the thing you just referred to in terms of the  
7 planning?

8 A They would be the chief people involved with the planning  
9 of the conventions, yes.

10 Q Okay. All right. March of 2003, Mr. Johnson asked you  
11 about one, two, three, four, five -- six phone calls between  
12 Huntsman and either you or Berkowski. Do you remember those  
13 questions?

14 A No.

15 Q And, by the way, when Mr. Johnson was questioning you, did  
16 he put this document up on the board?

17 MR. JOHNSON: Objection.

18 A No.

19 THE COURT: It's okay. Go ahead.

20 Q And let's move to March of 2003. We talked about those  
21 phone calls.

22 MR. STREETER: Let's put up -- by the way, I move into  
23 evidence PX-135.

24 MR. JOHNSON: No objection.

25 THE COURT: It's in evidence then.

1 MR. STREETER: Now let's pull up PX-139.

2 Blow up the top half.

3 Q Again, this lists you as Chair. Right?

4 A Correct.

5 Q Steering Committee meeting. Right?

6 A Correct.

7 MR. STREETER: Can you blow up the portion on the  
8 right there that discusses meeting.

9 Q Spring meeting, April 29, 2003. Do you see that?

10 A April 29, 2003, yes.

11 Q And this is April, right after the March phone calls he  
12 asked you about. Right?

13 A I forget what calls. Was it March? There were too many  
14 calls.

15 Q For now I'll represent to you that it was March of 2003.

16 A Okay.

17 Q And this is another meeting of the -- there's an actual  
18 meeting of the API, right, the steering committee?

19 A Correct.

20 Q And the same thing here, people from BASF and Bayer and  
21 Huntsman and Dow are involved in the organization. Right?

22 A Correct.

23 Q And there's a lot of planing that goes into setting up one  
24 of these meetings. Right?

25 A Correct.

1 Q And those people have to talk to each other beforehand to  
2 plan?

3 A Correct.

4 Q And it wouldn't surprise you to see that they're talking to  
5 each other in the month before the meeting?

6 A As it closes, yes, more calls.

7 Q All right. He asked you about some phone calls in August  
8 of 2003.

9 MR. STREETER: And I move into evidence PX-139.

10 MR. JOHNSON: No objection.

11 A August 2003? Okay.

12 Q He asked you some questions about phone calls in August of  
13 2003.

14 THE COURT: It's in evidence.

15 Q And I've got one, two, three, four, five, six, seven phone  
16 calls between people at Huntsman and either you or people at  
17 BASF, in this case Berkowski. Do you remember that testimony?

18 A Part of it, yes.

19 Q August of 2003.

20 Do you recognize this thick document right here, which  
21 is DX-2430?

22 A No.

23 Q You don't recognize it?

24 A It's so big and everything else. I know they had big  
25 documents on what they were doing, but this is 2002.

1 Q Go ahead and look at this document and tell me whether or  
2 not it's an API document.

3 A Well, API did a lot of work like that in the industry  
4 organization accumulating data, so something this large, they  
5 spend a lot of time and effort putting together the  
6 information, yes.

7 Q People from the API would spend a lot of time and effort  
8 putting it together?

9 A Yes.

10 Q Now, this is now 13 years ago. So you're saying you don't  
11 have a vivid memory of it?

12 A Well, I knew they had these and they did this work, I just  
13 don't remember a document from 2002.

14 Q Thirteen years ago?

15 A That's 13 years ago.

16 MR. STREETER: We offer it into evidence. It's  
17 DX-2430.

18 MR. JOHNSON: No objection.

19 THE COURT: All right. It's in evidence then.

20 MR. STREETER: Pull it up on the screen.

21 Q "2002, End-Use Market Survey on Urethanes Industry."

22 You were a salesman in the urethanes industry. Right?

23 A Correct.

24 Q The API was about -- it was Alliance for urethanes  
25 industry. Right?

1 A Correct.

2 Q And on the second page --

3 MR. STREETER: Can we pull up the second page.

4 Go down to the bottom of the screen and blow up the  
5 date.

6 Q August of 2003. Do you see that?

7 A Yes, I do.

8 Q So this document was prepared in August of 2003. Right?

9 A Correct.

10 Q The same time that all those phone calls in August that Mr.  
11 Johnson asked you about. Do you remember that?

12 A Correct.

13 Q And from time to time -- I want to ask you some questions  
14 about, when Mr. Johnson was questioning you, he asked you about  
15 some -- some discussions that you had with some of the business  
16 leaders about whether to do a price increase and whether not to  
17 do one. Right?

18 A He asked that question.

19 Q He had you talked about an argument that you had about  
20 whether it was the right time to do a price increase?

21 A He asked that, yes.

22 Q And was that a typical kind of spirited discussion that  
23 would go on between people at Dow about what to do?

24 A No, it was more complimentary and -- being presented  
25 because we were all working together. So it wasn't very -- a

1 time was a very argumentative type discussions like that.

2 Q But from time to time you would disagree about what you  
3 should do?

4 A From time to time we would disagree. And that's why we had  
5 a team put together to work together to see exactly what we  
6 wanted to do, and the timing.

7 Q And from your perspective, you're a salesman, you're  
8 dealing with the customers. Right?

9 A Correct.

10 Q And so you have a close relationship with the customers.  
11 Right?

12 A With some of them, yes.

13 Q And you're the one who has to go and face the customer when  
14 you're asking them for more money. None of these other people,  
15 you know, in the -- sort of the business group back in Midland  
16 had to go sit in a room with a customer and ask them for money  
17 the way you did. Right?

18 A I had to do it more often. But we also had field sellers  
19 that called on accounts that sometimes did that first initial  
20 discussion, yes.

21 Q But the people who were the business directors back in  
22 Midland, they didn't. Right?

23 A No.

24 Q And so sometimes you would have a relationship with the  
25 customer and you'd be close to the customer. Right?

1 MR. JOHNSON: Objection. This is just -- everything  
2 is just leading terribly.

3 THE COURT: It's leading. Please.

4 A Some of the customers I had a good relationship, yeah.

5 Q Don't answer, don't answer.

6 From time to time did you sympathize with the  
7 customers when you were asking them for a price increase?

8 A When you're asking for a price increase with a key  
9 customer, you talk to them and try to understand their dilemma  
10 on raising the prices to their customers and passing it along.  
11 And there would be times that it would be very difficult for  
12 them to make the move in the marketplace, so you had to listen  
13 both ways on what was going on. And that's why a little bit,  
14 if you notice, that we always gave typically 30-day  
15 notification to the customer so it wasn't immediately a price  
16 increase, they had time to put it together and get to their  
17 customers with the increase in their products.

18 Q From time to time did you feel sympathy for the customers  
19 when you were asking for more money?

20 MR. JOHNSON: Objection. Asked and answered.

21 THE COURT: It has, it was.

22 Q I want to pull up a document that Mr. Johnson asked you  
23 about; PX-707.

24 MR. STREETER: Would you put that up on the screen?

25 Can we blow up the text of this so it's a little more



1 readable? The whole thing. Make the text bigger.

2 Q He was asking you about this document on your  
3 cross-examination.

4 I want to point to some sections of the document he  
5 didn't ask you about. Okay?

6 A Okay.

7 Q All right.

8 MR. STREETER: Let's focus, first of all, on the  
9 second -- the bottom half of the document. So from the  
10 underlined portion, down. Blow up from the underlined portion  
11 down.

12 A Okay.

13 Q Okay.

14 MR. STREETER: Can you please blow up the sentence  
15 that begins, or highlight the begins that begins: "MDI has  
16 seen an almost"; and do that all the way to the bottom of the  
17 paragraph?

18 Q It says: (Reading) MDI has seen an almost 25-cent per  
19 pound decline on margins in the past five years; polyols  
20 declined \$.25 per pound and TDI by \$.15 per pound.

21 This was a year 2000 document. Right?

22 A Okay.

23 Q So let's say for the five years from 1995 to 2000, you've  
24 experienced though kinds of declines. Right?

25 A As represented here, yes.

1 Q And are those the exact kind of circumstances when you  
2 would say to yourself: We have to get prices up?

3 MR. JOHNSON: Objection, leading.

4 A We had to --

5 THE COURT: I'll allow it. Go ahead.

6 A When your margins went away and you see declines, you had  
7 to get the price up to cover the margins to get some  
8 profitability in those margin mixes, yes.

9 Q And what happens to the business if you don't have any  
10 margins?

11 A If you're in the business and over a period of time you  
12 don't have any margin making any profitability, you shut down  
13 the plant or sell it.

14 Q And from your customers' perspective, is it a good thing  
15 for them if you shut down your plant?

16 A Typically no, because it reduces the number of competitors  
17 out there selling the product, and also it shuts down the  
18 capability of how much product is out there for them to  
19 actually --

20 Q Do you know one way or another whether your customers  
21 wanted you to have no margin and basically have to shut down?

22 A No.

23 MR. JOHNSON: Objection to what the customers wanted.

24 THE COURT: Sustained.

25 MR. STREETER: Let's go up just a little bit on the

1 page and highlight the underlined portion.

2 Q It says: "We need these price recoveries."

3 And then it says: "We have strong dedication with the  
4 customer showing a commitment to get these energy costs passed  
5 through."

6 Energy costs. Petroleum, natural gas are feed stocks  
7 for MDI, TDI and polyol. Right?

8 A Yes.

9 Q That's the stuff you need in order to make your product.  
10 Right?

11 A Right.

12 Q And when the cost of that goes up, you've got to raise the  
13 price of your product?

14 A Correct.

15 Q And when you say, "Showing a commitment"; "We have strong  
16 dedication with the customer showing a commitment to get these  
17 energy costs pass through," what is that a reference to?

18 A When our costs go up we have to work with the customer and  
19 tell them, explain what's going on with the cost and explain  
20 this to them that we need a dedication of the customer  
21 showing -- you need to get the energy cost passed through or  
22 there's going to be a shutdown in the availability of products.

23 Q And are these the exact kind of circumstances -- when your  
24 energy costs are going up, are these the exact kind of  
25 circumstances when you and a businessman need to raise prices?

1 A Our costs are going up, so you try passing on the costs in  
2 the product to the customers down the road.

3 Q Okay. And when the costs are going up for Dow, are the  
4 costs also going up for your competitors?

5 MR. JOHNSON: Objection to what they were doing with  
6 their competitors.

7 THE COURT: Yeah. Sustained.

8 Q Do you know, do you know one way or the other whether or  
9 not your competitors need to use the same raw materials as you  
10 to make the product?

11 MR. JOHNSON: Your Honor, just because they use the  
12 same materials don't mean they have the same costs.

13 THE COURT: There could be variety of different  
14 variables that could change that. So sustained.

15 MR. STREETER: If we can -- if we could blow up the  
16 bottom half of that document again.

17 I want to blow up the one that begins -- highlight the  
18 one that begins: "Our economic profitability."

19 Q (Reading) Our economic profitability has declined to  
20 negative numbers in North America for the first quarter and we  
21 are projecting negative EP for the second quarter. We are  
22 seeing continued increases in energy costs that will continue  
23 to affect our business in the third and fourth quarter.

24 When you know that information, what does that tell  
25 you you need to do in order to maintain your business?

1 A We need to increase the price to get some margin in there  
2 to make sure that we can continue the keep that product line  
3 for the customer base.

4 MR. STREETER: If we could blow up, "Now is the time,"  
5 that paragraph.

6 Q (Reading) Now is the time for all to have the energy and  
7 fortitude to work with our customers to get our costs passed  
8 through and also generate the dynamics for them to move their  
9 markets to higher prices.

10 So these circumstances described in this document, the  
11 document --

12 MR. STREETER: Blow up the whole thing and just show  
13 the title again.

14 A "Price recovery."

15 Q "Price recovery."

16 So what are the circumstances here, and what does it  
17 mean in terms of what you have to do with prices in order to  
18 keep your business going?

19 A You had to get your price up so you make some sort of  
20 profitable margin so you could keep the plants in good shape  
21 and move forward. If you keep on losing money in the plants,  
22 you'd shut the plants down and move away from its products.

23 So you had to make sure you had some return on the  
24 money you're investing in those plants in order to continue to  
25 keep those plants going.

1           If the plants weren't making money over a period of  
2     time, they could be shut down and that business or volume of  
3     product would go away from the marketplace.

4     Q    And is the stuff described in this document the exact kind  
5     of things you would go talk to your customers about?

6     A    Yes, we'd be talking to them about how the price -- they'd  
7     see that the prices have dropped, margins were weak, they'd  
8     understand. And also that they would be looking at what  
9     they're doing in their market when they would have to buy our  
10    products.

11    Q    I want to turn to Bill Bernstein for a second.

12           MR. STREETER: Want to pull up PX-90 on the screen.

13           Blow up the text portion of the document. The whole  
14    thing, everything that shows text. Thank you.

15    Q    Do you remember being asked questions about this document  
16    which relates to the golf game that you had with BASF?

17    A    Yes.

18    Q    Some people from Dow, and some people from BASF were going  
19    to have a golf game. Right?

20    A    In Michigan, yes.

21    Q    And in addition to being a competitor, was BASF also a  
22    customer?

23    A    Yes, we sold them certain products that they did not make  
24    and they needed for their marketing.

25    Q    How big a customer were they?

1 A You know, I don't really recall now. I'm saying it was in  
2 the millions of dollars worth of business with them.

3 Q And they were just south of you in Michigan?

4 A They were about -- about a two-hour drive.

5 MR. STREETER: And if we could blow up Don Marquette.  
6 In the middle of the page you can see the people who were  
7 having this discussion. You can actually blow it up.

8 Q What role did Don Marquette have with respect to that  
9 relationship where BASF was your customer?

10 A Don Marquette was actually the corporate account manager  
11 for many accounts, so he had responsibility for many of the  
12 corporate accounts working out of Philadelphia. So he  
13 interfaced with somebody like --

14 THE COURT: Mr. Beitel, please --

15 A -- interfaced with somebody --

16 Q Can you move the whole microphone --

17 THE COURT: Either that, or sit up or --

18 Q You can actually move the microphone.

19 THE COURT: Mr. Streeter --

20 A Is this better? Can you hear okay?

21 THE COURT: Do you have much longer?

22 MR. STREETER: I'll be finished by the time you --

23 THE COURT: I'll see you at sidebar. We don't have to  
24 be on the record. Let's go.

25 (Sidebar discussion off the record.)

1 (In open court.)

2 Q So BASF is a big customer of Dow. Right?

3 A BASF was a big customer of certain products they did not  
4 manufacture themselves, yes.

5 Q Unusual for people from Dow to have a golf game with a big  
6 customer?

7 A No.

8 Q To talk about the millions of dollars in business that  
9 they're buying from you?

10 MR. JOHNSON: Objection, leading.

11 THE COURT: That's okay. Overruled for now.  
12 Overruled.

13 A We'd have a meeting, of course we'd talk about a discussion  
14 of the products they were buying and our availability to supply  
15 them their needed requirements, plus the pricing structure we  
16 were going to charge them.

17 Q And did you have a conversation with Bill Bernstein in  
18 which you talked about what you were charging your other  
19 customers?

20 A No.

21 Q And you testified about a lunch you had in Lucerne with Mr.  
22 Buhse. Do you remember that?

23 A I didn't remember the name, but I remember lunches, yes.

24 Q And Mr. Levi was there with you?

25 A Marco and him set it up, and I was the last minute invite.



1 Q And Buhse was from Bayer?

2 A Correct.

3 Q Had you ever met him before?

4 A Not to my recollection, no.

5 Q Were any discussions during the course of that lunch about  
6 the prices that Dow was charging to its customers?

7 A No.

8 Q Were there any discussions during that lunch about the  
9 prices that Bayer was charging to its customers?

10 A No.

11 Q Had Bayer been a huge customer of Dow from time to time?

12 A There were times where we did do business with Bayer just  
13 like we did with BASF, yes.

14 Q Did you sell them PO?

15 A PO was the one that we sold when I had responsibility for  
16 propylene oxide, yes.

17 MR. STREETER: I want to ask that PX-708 be put up on  
18 the screen.

19 Q This is another document that Mr. Johnson asked you about.

20 When you wrote: "Bayer and Huntsman have the lead in  
21 2001" -- do you see that at the top?

22 A About MDI, yes, I see that.

23 Q Tell us in your own words what you mean, what you're  
24 talking about there.

25 A Typically you had the major guy that was the strongest in

1 that particular field. Okay? If you're talking about polyols,  
2 we're back into propylene oxide and so forth, we were sort of  
3 the biggest, strongest in the polyol area.

4 When you look at some of the other markets like MDI,  
5 you had to look at who were the big leaders and the strength  
6 suppliers into that market and who had the strength. So you  
7 usually looked to see who was the strongest in the market to be  
8 the leader, not the fall-behind guy. The same thing in TDI.

9 Q If you're the small guy in the market, would you ever have  
10 a chance at having a price increase succeed if the big guy  
11 doesn't do it?

12 A You can --

13 MR. JOHNSON: Objection about what other people would  
14 do.

15 THE COURT: Sustained.

16 MR. STREETER: I'm just asking as a factual matter:  
17 If the big player didn't do a price increase announcement and  
18 you were the small player as you sometimes were, would you  
19 succeed in getting a price increase announcement if the big  
20 player who was your competitor didn't do one?

21 THE COURT: Sustained.

22 MR. STREETER: Judge, I'm just asking about --

23 THE COURT: All right. Go ahead.

24 Q What did you mean by -- okay, I want to ask the question.

25 Big player, your competitor doesn't do a price

1 increase announcement. Did you in your judgment, based on your  
2 experience, have any success doing a price increase  
3 announcement to that same market when you were the little  
4 player in that particular market?

5 MR. JOHNSON: Objection. Lacks foundation.

6 THE COURT: I'll allow it.

7 A It would be very difficult to get an increase if the major  
8 player didn't announce a price increase or do something in the  
9 marketplace. Now, there were specialty products that they  
10 might not be involved in.

11 Q Let me ask you, is that what you were referring to when you  
12 wrote "Bayer and Huntsman have to lead in 2001"?

13 A They'd have to lead because they were the big players in  
14 that particular market segment at that time.

15 Q Were you referring to any agreement whereby you had an  
16 agreement with your competitors where they would lead and you  
17 would follow?

18 A No.

19 Q Down the page.

20 You've got, "Bayer needs to lead BASF support." It's  
21 in the TDI section. You see that?

22 A Right.

23 Q Was BASF the second biggest player in the TDI market?

24 A They were bigger than Dow, both of them, yes.

25 Q Bayer biggest, BASF second biggest?

1 A I'm not exactly sure. They were both strong enough in that  
2 marketplace.

3 Q Tell us in your own words what you mean by "BASF needs to  
4 support."

5 A Well, if you had the two major players, and one major  
6 player announced the increase and the second major player  
7 doesn't, the market (sic) is not going to go through because  
8 they're not going to see that BASF raised their price.

9 Q One more on this page. Bottom of the page: "Bayer needs  
10 to support BASF will follow." You see that, all the way  
11 through that?

12 A Correct.

13 Q When you say "BASF will follow," were you saying that you  
14 knew because you talked to them that they were going to follow?

15 A No.

16 Q What are you saying?

17 A I'm saying that Bayer needs to lead, and BASF will be a  
18 follower in certain market segments.

19 MR. STREETER: I have one more document and then I'll  
20 be done.

21 PX-699.

22 Q Turn to page 17. This is a document that Mr. Johnson asked  
23 you about.

24 MR. STREETER: Let's go to the first page again.

25 Go to page 17.

1 Q He asked you some questions about this page. At the bottom  
2 he didn't ask you about the sentence: "It's up and demand is  
3 strong."

4 Do you see that?

5 A Yes.

6 Q What does "demand being strong" mean in terms of whether or  
7 not you've got a shot at getting your price increase  
8 announcement to work?

9 A Demand being strong helps you move more product and also  
10 means you have the capability of doing some price increases.

11 MR. STREETER: I don't have anything further, your  
12 Honor.

13 THE COURT: Mr. Johnson, any recross?

14 MR. JOHNSON: None at all.

15 THE COURT: Okay. Thank you very much.

16 Ladies and gentlemen, as I told you yesterday, we're  
17 not having court on Monday. We'll see you on Tuesday at 8:30  
18 and we'll probably have a similar day Tuesday, so bring any  
19 snacks if you need them. Okay? It'll probably be 8:30 to  
20 around 2:30 or so on Tuesday. And then the rest of the week,  
21 Wednesday and Thursday we'll probably go back to full day, you  
22 know, full, with a break to mix it up a little bit. Okay?

23 Please don't discuss anything about the case. Have a  
24 nice long weekend and we'll see you on Tuesday at 8:30.

25 Thanks again.

1 (The Jury leaves the courtroom.)

2 THE COURT: Mr. Beitel, just wait here.

3 Okay. You can step down now. You can step down.

4 THE WITNESS: I'm sorry.

5 THE COURT: All right. Everyone, be seated, please.

6 We want to get you back to Bozeman. Are you in

7 Bozeman?

8 THE WITNESS: No, Billings. My son and grandkids.

9 THE COURT: I've been in Bozeman. Nice good looking  
10 area of the country.

11 THE WITNESS: That's where I graduated, where I got my  
12 chemical engineer. 1969. So you can see how old I am.

13 THE COURT: All right.

14 (Witness excused.)

15 THE COURT: I'm going to have to do this rather  
16 quickly, but I wanted to address two legal issues that were  
17 raised so you have the weekend to deal with them. Okay.

18 The first one is with respect to this release  
19 regarding Leggett & Platt. Okay?

20 I'll let you submit briefs simultaneously Monday  
21 morning, no more than ten pages.

22 You know, I guess I have a couple of questions you  
23 might want to address. This would appear to me to have been an  
24 issue that should have been raised before the MDL judge. It  
25 appears to be a legal issue whether or not this release would

1 release them from any further litigation, including this  
2 litigation. But I don't believe in the record there was any  
3 motion to dismiss or for judgment in favor of the defendant  
4 against Platt -- Leggett & Platt in the MDL process. And  
5 that's the whole purpose of the MDL process. The whole purpose  
6 of that process is to sort out these types of things. And, I  
7 mean, Dow was aware of this document at that time. And so I'm  
8 raising that because that's one of the things that comes to my  
9 mind.

10 And then it would appear to be a legal issue as to  
11 whether or not this bars this lawsuit against -- I think that's  
12 your position. Right?

13 MR. STREETER: It is, yes, your Honor.

14 THE COURT: Okay. Whether it bars this lawsuit  
15 against Leggett & Platt. Okay. So address that.

16 And then I've read your letters as to supplementing  
17 Stephanie Barbour's testimony.

18 First of all, when that question was asked to Mr.  
19 Wood -- and the question -- I'm referring to Mr. Lustberg's  
20 letter of March 31st, 2016, the first page, the question was  
21 asked, there was no objection raised to that question when it  
22 was asked I don't believe, was there?

23 MR. BERNICK: Could you give me the letter?

24 I remember Mr. Wood being on the stand.

25 THE COURT: I don't -- I don't know. I don't know, if

1 the record --

2 MR. BERNICK: If this is about Mr. Schefsky --

3 THE COURT: Right.

4 MR. BERNICK: -- I don't -- all I remember is that  
5 we -- we did not have the opportunity to examine him on that  
6 issue, to examine Mr. Wood on that issue himself. I don't know  
7 whether at the time there was an objection to the  
8 cross-examination. Remember, they called him adversely.

9 THE COURT: Okay.

10 MR. BERNICK: So --

11 THE COURT: You know, I don't recall. Even if there  
12 was, I don't recall that there was an objection to this  
13 question. And the answer was "no."

14 And you're calling Mr. Schefsky?

15 MR. BERNICK: We're calling Mr. Schefsky.

16 THE COURT: You know, it would appear to me that  
17 the -- you were aware of this issue during the course of the  
18 process with Judge Pisano. It's clear, because you did object  
19 to certain areas, and certain areas he ruled in your favor  
20 eliminating certain areas of Stephanie Barbour's testimony. So  
21 I mean, you went through that process.

22 And in reading the areas you're seeking to supplement,  
23 she's already -- yeah, I mean, it wasn't included in the record  
24 and I don't think at this juncture -- I don't think the  
25 question is so misleading. And you're going to have Mr.



1 Schefsky testify, and he's going to explain it because --

2 MR. BERNICK: Your Honor, that might be a simple way  
3 to address this issue, is that the way the record reads is that  
4 she never says it was a price-fixing issue. She says --

5 THE COURT: She never said those words,  
6 "price-fixing."

7 MR. BERNICK: But she actually says it was a business  
8 issue.

9 THE COURT: But Mr. Schefsky believed it was.

10 MR. BERNICK: Mr. Schefsky inferred, if you  
11 actually --

12 THE COURT: Okay. He inferred from the information  
13 that she provided him --

14 MR. BERNICK: That it might --

15 THE COURT: -- that there was something wrong in terms  
16 of either antitrust or price-fixing.

17 MR. BERNICK: Or business practice. Either  
18 inappropriate --

19 THE COURT: No, no, no. His testimony -- I'll hear  
20 what he has to say. It would sound like his investigation was  
21 initiated by her because of the concerns -- well, we'll hear  
22 what he has to say.

23 MR. BERNICK: Exactly. But to the extent, to the  
24 extent you have him saying, I'm not sure, or I inferred.

25 And they're going to use that to establish that, in

1 fact, she made the complaint; whereas, under her own testimony  
2 she did not.

3 And what -- we can simply solve this. We're flagging  
4 it in advance --

5 THE COURT: Even in her testimony so far she never  
6 said "price-fixing."

7 MR. BERNICK: Correct.

8 THE COURT: Yeah.

9 MR. BERNICK: So all we would expect to do, want to do  
10 in order to address the contention that they're making based  
11 upon his inference, is to show him --

12 THE COURT: Whose inference?

13 MR. BERNICK: Schefsky's inference.

14 THE COURT: No. Your concern to open this up now is  
15 based on a question that was asked of Robert Wood before this  
16 jury: Mr. Schefsky, Dow's in-house lawyer for the urethanes  
17 business testified that he conducted two separate  
18 investigations in response to complaints that Ms. Barbour made  
19 that she suspected Mr. Fischer of engaging in price-fixing with  
20 competitors.

21 MR. BERNICK: Yes.

22 THE COURT: You weren't aware of these investigations,  
23 were you, sir?

24 And the answer was "No."

25 MR. BERNICK: Right.

1 THE COURT: And so you're arguing now that that should  
2 open up this to more testimony from Ms. Barbour based on that?

3 MR. BERNICK: No.

4 THE COURT: That's the premise of this whole --

5 MR. BERNICK: Not quite. That's the notice point;  
6 that is, that's when we woke up to this.

7 MR. JOHNSON: Oh, gee.

8 MR. BERNICK: I'm sorry, that's not really very  
9 courteous.

10 We woke up to it --

11 THE COURT: When you say you woke up to it --

12 MR. BERNICK: No, no. The argument that they make,  
13 the argument that they're making they made -- they made earlier  
14 on, in fact, a similar argument earlier on in their trial  
15 brief.

16 The key thing is, your Honor, we want to establish  
17 with Mr. Schefsky that he is making an inference, and then we  
18 want to use her testimony to refresh his recollection, if we  
19 can, to refresh his recollection about what it is that she  
20 actually said.

21 THE COURT: All right. Mr. Bernick, you knew all  
22 about this for months or more. You knew all about it. I read  
23 these -- it was clear to me that you were aware of her  
24 testimony.

25 MR. BERNICK: Correct.

1           THE COURT: You were aware of what Mr. Schefsky have  
2 was saying.

3           MR. BERNICK: Correct.

4           THE COURT: For whatever, as part of the process for  
5 preparing these video depositions through the Master here,  
6 Judge Pisano, you didn't include it.

7           MR. BERNICK: In the designations. And so I'm now --

8           THE COURT: This question in my mind doesn't open the  
9 door to supplementing the record right now. That's it. Okay.

10          MR. BERNICK: I understand that.

11          THE COURT: And that's the "hook" on which you're  
12 making this argument.

13          MR. STREETER: Your Honor --

14          MR. BERNICK: Just give me a second.

15                 Understanding that, I just want to make sure. We  
16 intend -- we will seek to refresh Mr. Schefsky's recollection  
17 with what she actually says, and I want to make sure that when  
18 we do that we don't give rise to this hullabaloo that we can't  
19 refresh his recollection.

20                 We understand what your Honor is saying about the  
21 designation, but we should be able to refresh his recollection  
22 about what she actually said based upon her own testimony --

23          THE COURT: It would depend on what he says initially  
24 as to what he recalls her saying.

25          MR. BERNICK: Do you want to -- I think that's fine.

1 THE COURT: Okay. Well, you know, he's also got his  
2 deposition in which he's also made certain statements. No?

3 MR. BERNICK: Correct. And I don't believe he's ever  
4 been shown her testimony in connection with that; that is to  
5 say --

6 THE COURT: He's never been shown that testimony?

7 MR. BERNICK: I never showed him the testimony.

8 THE COURT: Okay.

9 MR. BERNICK: And I represented him at the trial and  
10 at the subsequent deposition --

11 MR. JOHNSON: So if he hasn't been shown it, how could  
12 it possibly refresh his recollection?

13 MR. BERNICK: That's the point. He hasn't been --

14 THE COURT: Go ahead.

15 Don't interrupt.

16 Go ahead.

17 MR. BERNICK: That's exactly what refreshing  
18 recollection is, that he hasn't been shown. If he had been  
19 shown I kind of suspected his testimony would have been  
20 different.

21 So we will show him that and we will see what his  
22 testimony is going to be.

23 THE COURT: You think his testimony is going to be  
24 different if he had been aware of what Ms. Barbour said based  
25 on her deposition, not his own recollection?

1 MR. BERNICK: Certainly it would have been. Because  
2 he drew an inference, he drew an inference when he said those  
3 things. It's very plain. He says, I'm not sure but it may  
4 have been; or it may have been that that's -- he says it was  
5 either inappropriate or it involved some kind of allegation.

6 THE COURT: Well, for purposes of where we are now,  
7 I'm not going to allow the supplement of Stephanie Barbour's  
8 in, and the rest of it we can deal with on Tuesday if we have  
9 to as far as -- you'll be calling him when, Tuesday?

10 MR. BERNICK: No, we'll be calling him probably on  
11 Wednesday.

12 Is that right?

13 MR. STREETER: Yes.

14 THE COURT: We'll have time to further hear you both  
15 on that.

16                    Have a nice weekend.    See you Tuesday.

17 MR. BERNICK: Thank you.

18 THE COURT: Tuesday morning.

19 (At 2:18 p.m., an adjournment is taken to April 5,  
20 2016 at 8:30 a.m.)

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